



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



L. Eng. #46 e. $\frac{34}{2}$

CW.U.K.

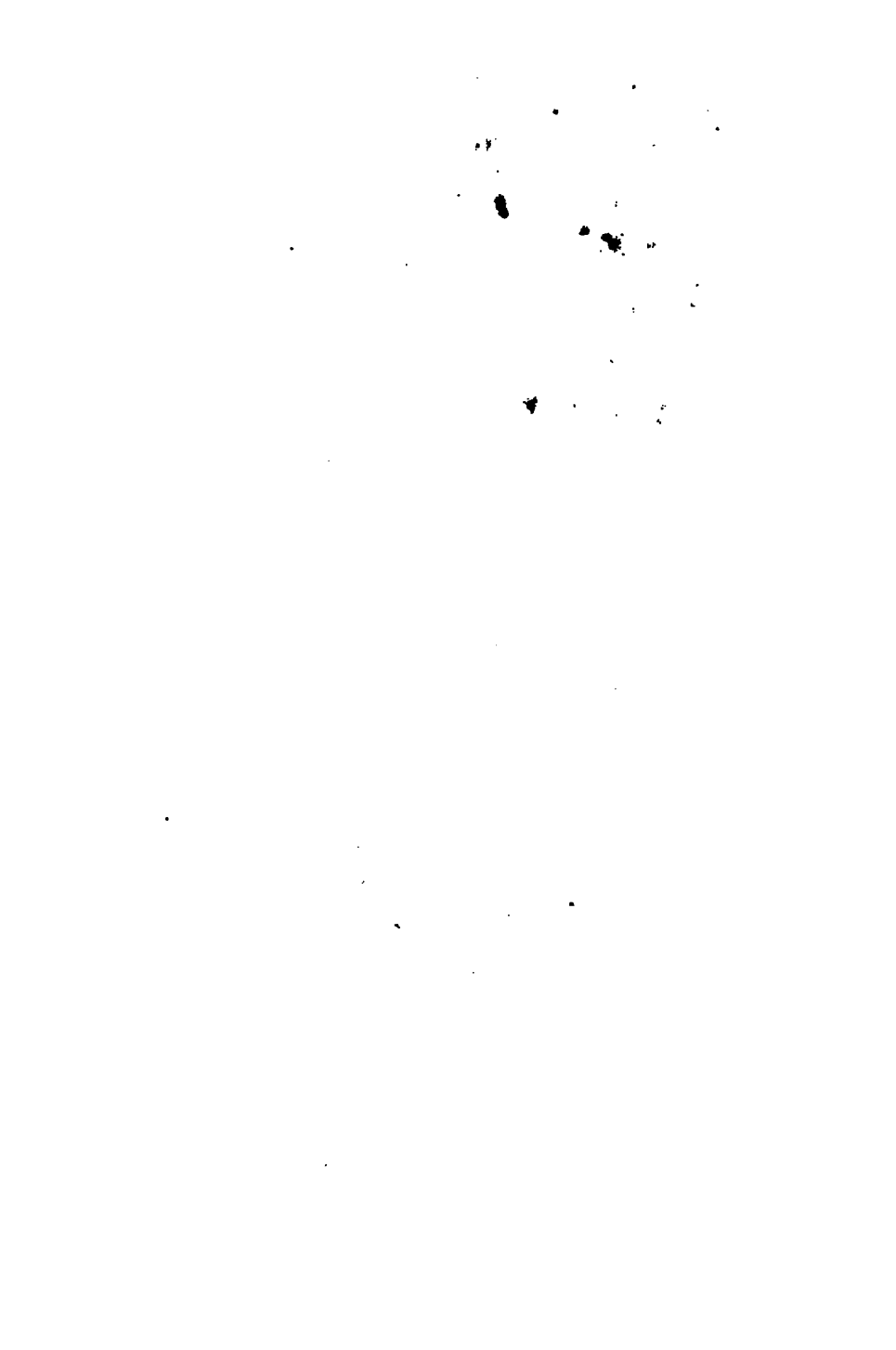
LL: X 585

A269 n1









THE
NEW
Practice of Attornies

IN THE
COURTS OF LAW AT WESTMINSTER,

WITH FORMS,

INCLUDING THE RECENT STATUTE
AS TO ATTORNIES, AND THE CASES DECIDED THEREON;

ALSO AN APPENDIX COMPRISING

Questions of Practice,

BY WHICH THE ERRORS IN PROCEEDINGS MAY BE DETECTED,
AND THE PROPER MODE OF TAKING ADVANTAGE
OF THEM ADOPTED.

IN TWO VOLUMES.

VOL. II.

By JOHN FREDERICK ARCHBOLD, Esq.
BARRISTER-AT-LAW.

LONDON:
SHAW AND SONS, FETTER LANE.

1844.

LONDON: PRINTED BY SHAW AND SONS,
137 & 138, FETTER LANE.



TABLE OF CONTENTS.

BOOK II.

CONTINUED FROM VOL. I.

CHAPTER VI.

Proceedings from verdict to judgment and execution.

SECT. I. *New trial*, 1 :—in what cases, 1 ;—for misdirection, 1 ;—for the rejection of evidence, 2 ;—wrong admission of evidence, 3 ;—verdict against evidence, 3 ;—for excessive damages, 4 ;—for smallness of damages, 5 ;—for default, &c., in the jurors, 5 ;—for default in the witnesses, &c., 6 ;—for default in parties, 7 ;—for default in the party's attorney, 9 ;—for default of the sheriff or other officer, 9 ;—for irregularity at the trial, 9 ;—for error in the pleadings, &c., 10 ;—where a party is taken by surprise, 11 ;—in cases of contested rights to land, &c., 12 ;—in penal actions, 12 ;—in hard or trifling actions, 12.

Setting aside a nonsuit, 13 ;—setting aside a verdict and entering a nonsuit, 14 ;—to set aside the execution of a writ of inquiry, 14 ;—to set aside a verdict on a writ of trial, 14.

Motion, 16 ;—rule, 17 ;—costs, 19.

II. *Venire de novo*, 21 :—in what cases, 21 ;—costs, 22.

III. *Arrest of judgment*, 23.

IV. *Judgment*, 23.

1. *Judgment in ordinary cases*, 23 :—when and how signed, 24 ;—interest on judgment, 24 ;—when and how entered, &c., 25 ;—when

- and how registered, 25 ;—lien of judgments on lands, &c., 27 ;—lien of judgments on government or other stocks, 28 ;—relation of judgments, 30.
2. *Statutory judgments*, 30 :—decrees, rules, orders, &c., 30 ;—when to be treated as judgments, 30 ;—to be registered, 31 ;—execution thereon, 31.
 3. *Judgments, &c., of inferior courts*, 31 :—how and in what cases removed, 31 ;—application and order, 32 ;—effect of the removal, 32.
- V. *Judgment non obstante veredicto*, 33 :—in what cases, 33 ;—when motion to be made, 33 ;—how damages afterwards assessed, 33 ;—costs, 34.
- VI. *Scire facias*, 34.
1. *In what cases*, 34 ;—to revive a judgment, 34 ;—after death or marriage of parties, 34 ;—against bail, 35 ; in other cases, 35.
 2. *The writ and proceedings thereon*, 35 :—the writ, 35 ;—judgment for want of appearance, 37 ;—appearance, 38 ;—declaration, &c., 38 ;—costs, 38.
- VII. *Remittitur damna*, 38 :—in what cases, 38.
- VIII. *Costs*, 39.
1. *Upon a verdict for plaintiff*, 39 :—in what cases, 39 ;—in what not, if the judge certify, 40 ;—in what not, if the judge do not certify, 42 ;—if defendant have been arrested without probable cause, 44, 51 ;—if defendant might have been sued in a court of requests, &c., 51.
 2. *Upon a verdict for defendant*, 56.
 3. *Where there are several issues*, 58.
 4. *Upon nul tiel record*, 62 ;—judgment by default, 62 ;—or judgment *non obstante veredicto*, 63.
 5. *Upon demurrer*, 63 ;—arrest of judgment, 64 ;—or writ of error, 64.
 6. *Upon nonpros*, 64 ;—or nonsuit, 64.
 7. *Double and treble costs*, 64.
 8. *Taxation of costs*, 66 :—notice of taxation, &c. 66 ;—what costs allowed, 67 ;—in taxing between attorney and client, 67 ;—in taxing between party and party, 69 ;—expenses of witnesses, &c. 70 ;—costs of special jury, 73 ;—fees to counsel, 73 ;—taxation of costs in causes not exceeding 20*l.*, 74 ;—table of costs in all cases, as well above

as under 201., 78;—motion to review the taxation, 82.

9. *Remedy for costs*, 82:—in what cases, 82.

IX. *Execution*, 83.

1. *Execution generally*, 83:—in what cases, and how sued out, 83;—direction, teste and return, 84;—it must pursue the judgment, 86;—how indorsed, 87;—when to be sued out, 88;—delivery of the writ to be executed, 88;—priority of writs, 88;—remedy for the amount levied, 89.

2. *Fieri facias*, 90:—what goods may be taken under it, 90;—how executed, 94;—*renditioni exponas* and *distringas*, 94;—rent deducted, 95;—other writs after it, 96.

3. *Elegit*, 96:—what property may be extended under it, 97;—writ how executed, 98.

4. *Capias ad satisfaciendum*, how executed, 99;—effect of the party's discharge after arrest, 99.

5. *Execution on rules, decrees, &c.* 101.

6. *Execution on judgments or rules of inferior courts*, 102.

7. *Interpleader at the instance of the sheriff*, 103:—in what cases, 103;—the rule, 105;—issue, costs, &c. 107.

X. *Set off of judgment and costs*, 109:—in different actions, 109;—in the same action, 110;—costs in equity, 111;—in other cases, 112.

XI. *Entry of satisfaction on the roll*, 112:—in what cases, 112;—how, 113.

CHAPTER VII.

Amendment and writ of error.

SECT. I. *Amendment*, 113:—Amendment in particular instances, 115;—of pleas in abatement, 115;—of an affidavit, 115;—appearance, 115;—avowry, &c. 116;—bail, 116;—*capias*, 117;—declaration, 117;—declaration in ejectment, 118;—inquiry, writ of, &c. 119;—error, writ of, &c. 119;—execution, 119;—*habeas corpus*, 120;—issue, 120;—judgment, 121;—jury process, 121;—*nisi prius* record, 121;—orders at *nisi prius*, 122;—particulars of demand, 122;—penal actions, 122;—pleas, 123;—records, 124;—re-

plication, 124 ;—rules, 125 ;—scire facias, 125 ; summons, writ of, 125 ;—verdict, 126 ;—writ of trial, 127.

Amendment, at the trial, 127 ;—by consent, &c. 127 ;—upon trial by the record, 128 ;—by statute, 128.

Amendment at other times, 132 ;—after plea in abatement, 132 ;—after demurrer, 133 ;—after error, 133 ;—after new trial granted, 134 ;—after nonsuit, 134.

- II. *Error, writ of*, 135 :—in what cases, 135 ;—within what time, 135 ;—by and against whom, 135 ;—to what court, 136. The writ, and how sued out and allowed, 136 ;—in what cases it abates, or may be quashed, 137 ;—how far a supersedeas of execution, 138. Bail, 140. Certifying the record, 142 ;—assigning errors, &c. 143 ;—joinder in error, &c., 144 ;—argument, &c. 144 ;—interest, 145 ;—costs, 145 ;—judgment, &c. 146.

Error coram nobis or coram vobis, 146.

BOOK III.

Proceedings in particular actions.

CHAPTER I.

Ejectment.

SECT. I. *Notice to quit*, 148 :—in what cases, 148 ;—by landlord, 149 ;—by tenant, 150 ;—form and service, 150.

- II. *Ejectment in ordinary cases*, 151 ;—declaration and notice, 151 ;—when and how served, 153, on the tenant or his wife, 154, on servant, &c. with admission afterwards of receipt by the tenant, 157, on servant, &c. when it is probable that the tenant received it, 158 ;—service, where the tenant keeps out of the way to avoid it, 159 ;—service, in what cases good from necessity, 161 ;—affidavit of service, 162. Judgment against the casual ejector, 163.

Appearance and plea, 162 :—by tenant in possession, 162 ;—by landlord, &c. 166. Issue, notice of trial, &c., 168. Trial, execution, &c.,

Contents.

v

- 168;—nonsuit, 168;—verdict, 169;—certificate for immediate execution, 170. Execution, 170.
- III. *Ejectment where the possession is vacant*, 171:—lease, possession, entry, and ouster, 172;—declaration, rule to plead, judgment and execution, 172.
- IV. *Ejectment by landlord against tenant, for a forfeiture*, 172.
- V. *Ejectment for holding over after the determination of the tenancy*, 175:—demand, declaration, 176;—bail, &c., 177;—trial, &c., 178;—execution, 179.

CHAPTER II.

Replevin.

1. *The replevin and replevin bond*, 180:—bond, 180;—the replevin, 181;—bond how forfeited, &c., 182;—remedy on it, 182.
2. *Proceedings in the county court*, 183.
3. *Proceedings in the court above*, 183:—removal of the cause, 183;—appearance and declaration, 184;—avowry or cognizance, 184;—plea in bar, 184;—issue, trial, &c. 185;—writ of inquiry, 185;—costs, 186;—judgment and execution, 186.
4. *Collateral proceedings, judgment as in case of nonsuit*, 187:—payment of money into court, 187.

CHAPTER III.

Penal Actions.

Proceedings in, 187:—compounding, how and in what cases, 188.

CHAPTER IV.

Feigned issue, 189.

How settled, 189:—proceedings to trial, 189;—costs, 189.

BOOK IV.

Proceedings in actions by and against particular persons.

CHAPTER I.

Actions by and against attornies.

SECT. I. *Action by an attorney for the amount of his bill of costs*, 190; *see ante*, Vol. 1, p. 76—79:—delivery

of bill, 190 :—process and declaration, 190 ;—
evidence of plaintiff under general issue, 191 ;—
defence and evidence, 191.

II. *Action against an attorney*, 191 :—in what cases and
how, 191, 192.

CHAPTER II.

Actions by and against bankrupts, and their assignees.

SECT. I. *Actions against bankrupts*, 192 :—Their discharge from
arrest, in what cases, 192 ;—election of creditor
193 ;—effect of bankruptcy on a suit, 193.

II. *Actions by or against assignees*, 194.

CHAPTER III.

Actions against clergymen.

Proceedings to judgment, 195 ;—execution, 195.

CHAPTER IV.

Actions by and against corporations, 196.

CHAPTER V.

Actions by and against executors and administrators.

SECT. I. *Actions by them*, 197 :—process, &c. 197 ;—costs, 197.

II. *Actions against them*, 199 :—process, &c. 199 ;—costs,
199 ;—devastavit, 200.

CHAPTER VI.

Actions against hundredors, &c.

Against hundredors, 201 ;—against inhabitants of a city,
&c., 201.

CHAPTER VII.

Actions by and against husband and wife.

SECT. I. *Actions by them*, 202 :—proceedings therein, 202 ;—
marriage of feme sole pending an action by her,
effect of it, 202.

- II. *Action against them*, 203 :—proceedings in it, 203 ;—execution, 203 ;—effect of marriage of feme sole, after judgment against her, 203.

CHAPTER VIII.

Actions by and against idiots and lunatics, 204.

CHAPTER IX.

Actions by and against infants.

- SECT. I. *Actions by infants*, 204 :—must sue by *prochein amy*, or guardian, 204 ;—costs, 205.
 II. *Actions against infants*, 206 :—must defend by guardian, 206 ;—warrants of attorney by infants, 207.

CHAPTER X.

Proceedings by and against insolvents.

1. *Discharge of insolvent under 48 G. 3, c. 123* :—after being a year in custody in execution for a sum under 20*l.*, p. 207 ;—motion when and where to be made, 209.
2. *Action by an insolvent*, 210.
3. *Action against an insolvent*, 211.

CHAPTER XII.

Actions against Justices of Peace, Constables, &c.

- SECT. I. *Actions against justices*, 212 :—in what cases, 212 ; limitation of action, 212 ;—notice of action, 212 ; venue, plea, &c. 214.
 II. *Actions against constables*, 215 :—demand of warrant, 215 ;—verdict, costs, &c. 215.

CHAPTER XIII.

Actions by paupers. 215.

Admission to sue in *forma pauperis*, 215 ;—in what cases dispaupered, 216 ;—costs, 216.

CHAPTER XIV.

Actions against peers and members of parliament.

Actions against them, 217 :—attachment, 217 ;—proceedings against them under the bankrupt act, 217.

CHAPTER XV.

Proceedings by and against prisoners.

- SECT. I.** *Actions against them*, 218 :—process, 218 ;—bail, 220 ;—declaration, 221 ;—plea, &c. 222 ;—trial or final judgment, 223 ;—execution, 224. *Supersedeas*, 229 :—in what cases, 229 ;—application for it, and order, 231 ;—discharge of prisoner thereupon, 231. Discharge by keeper of the Queen's prison, of prisoners supersedeable, 231.
- II.** *Habeas corpus*, 231 :—*habeas corpus cum causâ*, 231 ;—*habeas corpus ad respondendum*, 232 ;—*habeas corpus ad satisfaciendum*, 233.
- III.** *Proceedings in other matters relating to prisoners*, 233. Attachment against a prisoner, 233 ;—irregularity, when to be taken advantage of, by a prisoner, 233. Discharge of prisoner otherwise than by *supersedeas*, 234.

BOOK V.

*Arbitration.**Arbitration*, 235.

1. *The submission*, 235 :—by whom, 236 ;—how, 236 ;—by order of *nisi prius*, 236 ;—by rule of court, or judge's order, 237 ;—by bond, &c. 237. Arbitrator refusing to act, 238 ;—revocation, 239.
2. *Proceedings before the arbitrator, and the award*, 241 ; umpire and umpirage, 241 ;—witnesses, 243 ; examination of parties, 244 ;—time for making the award enlarged, 244 ;—the award, 246 ;—costs, 248 ;—costs for delaying the proceedings, &c. 251.
3. *Enforcing the award*, 251 :—on a submission

- by deed, &c. 251 ;—where a cause is referred at nisi prius, 251 ;—where the submission is by rule of court or judge's order, 252.
4. *Attachment for non-performance of an award*, 252 :—in what cases, 252 ;—making the submission a rule of court, 254 ;—service and demand, &c. 254 ;—affidavit, motion, &c. 255.
5. *Execution for the sum awarded*, 257.
6. *Setting aside the award*, 258 :—when and how, 258. For what defects an award will be set aside, 261 :—misconduct of the arbitrator, 261 ;—mistake in law, &c. 263 ;—award not pursuing the submission, 264 ;—that the arbitrator has exceeded his authority, 264 ;—that he has not awarded on all the matters referred to him, 265 ;—that the award is uncertain, 266 ;—that it is inconsistent, 268 ;—that it is not final, 268 ;—that it is void, 270 ;—for perjury or fraud, 270.

BOOK VI.

Rules, judges' orders, &c.

- SECT. I. *Affidavits*, 271 :—form, 271 ;—title of the court, 272 ;—title of the cause, 273 ;—deponent's addition, 276 ;—body of the affidavit, 278 ;—signature, 279 ;—jurat, 280 ;—when to be sworn, 283 ; defects waived or remedied, 283.
- II. *Rules*, 285. —
1. *The motion and rule*, 285 :—affidavit, 285 ;—the motion, 286 ;—the rule, 287 ;—service of it, 289.
 2. *Cause shown*, &c. 291 :—when, 292 ;—affidavit, 292 ;—cause shown, how, &c. 293 ;—costs, 294.
 3. *Enlarging, opening, rescinding, &c. of rules*, 296 :—enlarging rules, 296 ;—opening rules, 297 ;—rescinding rules, 297.
- III. *Judge's order*, 297 :—in what cases, 297 ;—summons, 298 ;—affidavit, 300 ;—order, 300.
- IV. *Attachment*, 303 :—in what cases, 303 ;—disobeying rules of court, 303 ;—in other cases, 304 ;—against peers, 305.

Proceedings for obtaining the writ, 305 :—
service and demand, 305 ;—affidavit, 307 ;—
rule, &c. 307 ;—the attachment and proceedings
thereon, 309.

V. *Execution upon rules*, 311 :—under stat. 1 & 2 Vict.
c. 110, 311.

BOOK VII.

Irregularity, and the mode of taking advantage of it.

Irregularity, what, 314 ;—in what cases waived, 315 ;
—when motion to be made, 318 ;—the rule,
&c. 320.

APPENDIX.

Forms.

Postea in debt, 323 ;—in covenant, 324 ;—in assumpsit, 324 ;
—in trespass, case or trover, 324 ;—upon a nonsuit,
324 ;—upon a verdict for defendant, 325.

Judgment for plaintiff, in assumpsit, 326.

Scire facias to revive a judgment for plaintiff after a year, 326.

Writs of execution, 327.

Elegit upon a judgment in the court of Q. B. in an action
of assumpsit, 327 ;—on a rule made in the court of
Q. B. for payment of money, 329 ;—on a rule made in
Q. B. for payment of money and costs, 330 ;—on a
judgment of an inferior court in an action of assumpsit,
removed into the court of Q. B., 331 ;—on an order
for payment of money made in inferior court and re-
moved into Q. B., 333 ;—on a rule for payment of money
and costs made in an inferior court and removed into
Q. B., 334.

Fieri facias on a judgment in Q. B. in action of assump-
sit, 336 ;—fi. fa. on an order of the court of Q. B. for
payment of money, 337 ;—fi. fa. on an order of Q. B.
for payment of money and costs, 337 ;—fi. fa. on a
judgment of inferior court in an action of assumpsit,
removed into Q. B., 338 ;—fi. fa. on order for payment
of money made in an inferior court and removed into
Q. B. 339 ;—fi. fa. on order for payment of money and
costs made in inferior court, and removed into Q. B.,
340.

- Capias ad satisfaciendum*, 341.
Satisfaction piece, 341.
Writ of error, 342 :—*præcipe*, 342 ;—common joinder in error, 342.
Ejectment, 342 :—notice to quit, 342.
 ejectment in ordinary cases, 343 :—affidavit of service of declaration, 343 ;—plea, general issue, 343 ;—writ of *habere facias possessionem*, 343.
 ejectment on a vacant possession, 344 :—letter of attorney to enter, &c., 344 ;—lease, 345 ;—declaration, 346.
 ejectment by landlord against tenant, 347 :—notice at foot of declaration, 347 ;—affidavit for rule for bail, 347.
Replevin, 348.
 præcipe for the *recordari facias loquelam*, 348 ;—writ of *re. fa. lo.* for plaintiff, 348.
Actions against clergymen, 349.
 sheriff's return to a *fi. fa.*, 349 ;—writ of *feri facias de bonis ecclesiasticis*, 349.
Actions by infants, 350.
 petition to sue by *prochein amy*, 350 ;—*prochein amy*'s consent thereto, 350 ;—affidavit of signing same, 351 ;—judge's fiat for a rule thereon, 351.
Actions against infants, 351.
 petition to defend by guardian, 351 :—guardian's consent thereto, 352 ;—affidavit of signing same, 352.
Actions against justices of peace, &c., 352.
 notice of action, 352 :—demand of copy of warrant from a constable, 352.
Action by pauper, 353.
 petition to be admitted to sue in form *pauperis*, 353 ;—certificate of counsel, 353 ;—affidavit of plaintiff's poverty, 354.
Proceedings against prisoners, 354.
 declaration, 354 ;—writ of detainer, 354 ;—committitur piece, 355 ;—writ of *supersedeas* for not declaring, 355 ;—*habeas corpus* to bring the principal up, if in custody, 356 ;—writ of *habeas corpus ad satisfaciendum*, 356.
Arbitration, 357 :—bond of submission, 357 ;—the award, 358.
Affidavits, 359 :—general form, 359.

APPENDIX II.

Questions of Practice, 361.

ADDENDA of new cases.

ERRATA AND ADDENDA

To the Second Volume.

PAGE

- 17, line 17 from bottom, after "703," add "Quære if not over-ruled in the Exchequer, Mich. 1843."
- 19, — 16 ————— for "2 Mees. & W." read "8 Mees. & W."
- 55, — 13 ————— for "4 Bing.," read "8 Bing."
- 67, — 10 ————— for "Vol. 1, p. 86," read "Vol. 1, p. 89."
- 82, — 11 from top, for "tax," read "case."
- 82, — 11 from bottom, for "ante, p. 119, &c." read "post, p. 303, &c., and by execution; see post, p. 311."
- 117, — 10 ————— for "Pachico," read "Pacheco."
- 179, — 4 & 8 from top, dele " " .
- 180, — 8 ————— for "revising," read "reversing."
- 186, — 23 ————— for "double costs of suit," read "such full costs, charges and expenses incurred in the action, as shall be taxed by the master. See ante, pp. 64, 65."
- 190, — 5 ————— after "Actions by attornies," add "see ante, Vol. 1, pp. 76—79."
- 224, — 20 ————— for "Vict. 100," read "Vict. 110."
- 246, — 14 from bottom, for "8 Dowl. N. C." read "2 Dowl. N. C." .
- 246, — 5 ————— for "award," read "an award."
- 279, — 23 ————— after "2 Cr. M. & R. 315," add "Nash v. Swinburne, 3 Man. & Gr. 630. Bromley v. Geridge, 13 Law J. 16, cp."
- 286, — 20 ————— for "1 Ad. & El." read "1 Ad. & El. N. C."
- 286, — 14 ————— for "otherwise," read "otherwise."
- 287, — 14 ————— after "12 Law J. 40, qb." add "Ex p. Hasleham, 1 Dowl. N. C. 792. Levy v. Coyle, 12 Law J. 295, qb., 2 Dowl. N. C. 932. Withers v. Spooner, 2 Dowl. N. C. 884."
- 289, — 10 ————— after "3 Dowl. 343," add "Clarke v. Roberts, 1 Dowl. N. C. 778."
- 312, — 22 ————— for "7 Mees. & W." read "8 Mees. & W."

TABLE OF CASES

IN VOL. II.

	PAGE		PAGE
. Alexander, 3 Camp. 35.....	57	Ames v. Milward, 2 Moore, 713	268
. Hopper, 8 Dowl. 19.....	301	Amiot v. Evans, 7 Mees. & W. 468..	290
. Parsons, 7 Bing. 563.....	3	Amor v. Blofield, 1 Dowl. 277.....	45
. Rice, 3 Bing. 182.....	113	Amor v. Smith, 7 Dowl. 806.....	319
by v. Paton, 8 Law J., 206,		Anderson v. Baker, 8 Dowl. 107..	273, 291
	111	Anderson v. Calloway, 1 Dowl. 666.	105
. v. Paynter, 8 Price, 95.....	94	Anderson v. Chapman, 5 Mees. & W.	468
. Bankart, 1 Cr. M. & R. 681.	236		60
. Hughes, 1 Brod. & B. 24..	304	Anderson v. Ell, 3 Dowl. 78.....	115, 284
. Luck, 3 Brod. & B. 25 ...	117	Anderson v. Fuller, 4 Mees. & W.	470
. Power, 7 Car. & P. 76....	180		259
. Sparry, 1 Wils. 155.....	85	Anderson v. Neale, 1 B. & P. 31....	116
n v. Noel, 2 Chit. 200.....	72	Anderson v. Sherwin, 7 Car. & P.	527
. Gray, 2 Wils. 238.....	261		42
Stubbs, 1 Har. & W. 520.....	37	Anderson v. Earl of Stirling, 2 Dowl.	267
. Wilks, 6 B. & C. 237.....	141		316
. Burrows, Doug. 250. 263,		Andrews v. Dixon, 3 B. & A. 645 ..	96
	53, 56	Andrews v. Palmer, 4 B. & A. 260..	241
n v. Cargay, 9 Moore, 281.		Andrews v. Sharp, 2 W. Bl. 911....	309
	251, 265	Andrews v. Thornton, 8 Bing. 451..	72
Stocks, 4 Bing. 509.....	213	Angel v. Ihler, 9 Law J., 8 ex.	15
. Walker, 3 Dowl. 258.....	289	Angel v. Ihler, 5 Mees. & W. 168 ..	277
Toomer, 3 Dowl. 563. 1 Har.		Angel v. Iler, 7 Dowl. 846.....	17
	305	Angus v. Bedford, 13 Law J., 180, ex.	266
Savill, 5 Taunt. 454	263	Anon. 1 Bur. 661	308
. v. St. Aubin, 6 Mees. & W.		Anon. 1 Chit. 14	318
	196	Anon. 1 Chit. 102	153
er v. Barker, 2 Tyr. 140	3, 13	Anon. 1 Chit. 350 n.	119
er v. Porter, 1 Dowl. N. C.		Anon. 1 Chit. 398	295
	302	Anon. 1 Chit. 536	118
. Howell, 1 Nev. & M. 191..	7	Anon. 1 Chit. 562 n.	279
. Furnival, 2 Dowl. 49	82, 293, 295	Anon. 2 Chit. 44	261
	104, 107	Anon. 2 Chit. 181	161
Gibbon, 2 Dowl. 292.....	104, 107	Anon. 2 Chit. 182	154
Lowe, 12 Law J., 115, qb..	270	Anon. 2 Chit. 186	160
Turner, 2 Dowl. N. C. 21..	55	Anon. 2 Chit. 187	157
. Proudlock, 5 Nev. & M.		Anon. 2 Chit. 425	19
	58, 248	Anon. 1 Dowl. 18	153
. v. Proudlock, 4 Dowl. 54.		Anon. 1 Dowl. 23	318
	259, 260	Anon. 1 Dowl. 32	141
Newton, 2 Dowl. 582.....	305	Anon. 1 Dowl. 150	210
. Baldwin, 2 Dowl. 599....	72	Anon. 2 Dowl. 227	287
. Crisp, 10 Law J., 130, qb.	319	Anon. 1 D. & R. 435 n.	176
. Adeane, 3 Dowl. 408	107	Anon. 1 Har. & W. 146.....	15
. Lunn, 9 B. & C. 395. 221, 225		Anon. 1 Smith, 61	278
Lettice, 6 Mees. & W. 216..	16	Anon. 2 Smith, 261.....	47

	PAGE		PAGE
Anon. 3 Smith, 118.....	308	B.	
Anon. 4 Taunt. 690.....	292	Baddely v. Shafto, 8 Taunt. 434	186
Anon. 8 T. R. 467 cit.	62	Baden v. Flight, 6 Dowl. 177.	114, 309
Anon. 1 Tidd, 160	117	Badger, Re, 2 B. & A. 691.....	268
Anon. 1 Tidd, 690	115	Badley v. Loveday, 1 B. & P. 81 ..	253
Anon. 1 Wils. 22.....	3	Badley v. Oliver, 1 Cr. & M. 219 ..	55
Anon. 1 Wils. 35.....	143	Badman v. Pugh, 12 Law J., 126, cp.	303, 319
Anon. 1 Wils. 256	123	Bagnall v. Gray, 2 W. Bl. 1140	36
Ansell v. Evans, 7 T. R. 1	238	Bagnall v. Underwood, 11 Price, 511.	73
Anthill v. Medcalfe, 2 New Rep. 169.	299	Baildon v. Pitter, 3 B. & A. 210....	52, 53, 55
Apothecaries' Company v. Harrison,			
12 Ad. & El. 642.....	130	Bailey v. Bailey, 1 Bing. 92.....	182
Archer v. Barnes, 3 East, 342.....	317	Bailey v. Chitty, 5 Dowl. 307	53
Archer v. Dudley, 1 B. & P. 381 n..	182	Bailey v. Chitty, 2 Mees. & W. 28.	53, 56
Archer v. Garrard, 6 Dowl. 132	318	Bainbridge v. Houlton, 5 East, 21.	256, 274
Archer v. Marsh, 5 Bing. N. C. 541..	71	Baker v. Brown, 5 Dowl. 313	5
Archer v. Owen, 9 Dowl. 341	263	Baker v. Brown, 2 Mees. & W. 199..	127
Armitage v. Foster, 1 Har. & W. 208.	108	Baker v. Garrett, 3 Bing. 36.....	181
Armstrong, R. v., 2 Cr. M. & E. 205..	195	Baker v. Lade, Carth. 253	186
Armstrong v. Marshall, 4 Dowl. 593,		Baker v. Leathes, Wightw. 113	4
1 Har. & W. 643.....	263	Baker v. Neaver, 1 Cr. & M. 112 ..	118
Arnell v. Weatherby, 1 Cr. M. & R.		Baker v. Ridgway, 2 Bing. 41.....	100
831.....	86, 119	Baker v. Rye, 1 Dowl. 689	303
Arnett v. Garnett, 3 B. & A. 440....	95	Baker v. Townsend, 7 Taunt. 422 ..	235
Arnold v. Evans, 9 Dowl. 219.....	290	Bale v. Hodgetts, 1 Bing. 382.....	39, 119
Arundel v. Chitty, 1 Dowl. 499	99	Ballam v. Price, 2 Moore, 235.....	100
Ashton v. Naull, 2 Dowl. 727	48	Ballantine v. Taylor, 1 Nev. & P. 219.	49
Ashton v. Poynter, 3 Dowl. 465. 1		Balson v. Meggatt, 4 Dowl. 557, 1	
Gale, 57	198, 199	Har. & W. 659.....	88
Ashton v. Poynter, 3 Dowl. 201.....	263	Banks v. Banks, 1 Gale, 46	244
Ashworth v. Heathcote, 6 Bing. 596.	298	Barber v. Mitchell, 2 Dowl. 574	89
Aslin v. Parkin, 2 Burr. 685	180	Barclay v. Fabor, 2 B. & A. 743 ..	220
Aspinall v. Stamp, 3 B. & C. 108....	111	Bardell, R. v., 1 Nev. & P. 74.....	240
Astley v. Jay, 8 Law J., 104 qb.....	75	Barehead v. Hall, 9 Law J., 323, ex.	312
Aston v. George, 2 B. & A. 395....	237, 238, 251	Barham v. Lee, 2 Dowl. 779	285
Athey v. Heard, Cro. Car. 219.....	198	Barker v. Braham, 2 W. Bl. 869....	109
Atkins v. Kilby & Wyatt, 9 Law J.,		Barker v. Dynes, 1 Dowl. 169	108
52, m.....	215	Barker v. Hollier, 8 Mees. & W. 513	43
Atkins v. Meredith, 4 Dowl. 653....	292	Barker v. Phipson, 3 Dowl. 590....	104, 105
Atkins v. Seward, 1 Brod. & B. 275.	194	Barlow v. Hall, 2 Anst. 461.....	290
Atkinson v. —, 2 Chit. 5	115	Barnard v. Guy, 2 Smith, 259	119
Atkinson v. Abraham, 1 B. & P. 175.	262	Barnard v. Higdon, 3 B. & A. 213 ..	197
Atkinson v. Baynton, 1 Hodg. 7....	100	Barnard v. Leigh, 1 Stark. 43.....	91
Atkinson v. Baynton, 1 Hod. 144 ..	183	Barnard v. Moss, 1 H. Bl. 107	39, 250
Atkinson v. Bayntun, 1 Bing. N. C.		Barnes v. Whiteman, 9 Dowl. 181 ..	15
740	123	Barnett v. Glossop, 3 Dowl. 625	16
Atkinson v. Newton, 2 B. & P. 338..	119	Barnett v. Harris, 2 Dowl. 186.....	221, 223
Atwill v. Baker, 5 Dowl. 462	121, 285	Barney v. Tubb, 2 H. Bl. 160	54, 66
Aubert v. Maze, 2 B. & P. 371	263	Barrack v. Newton, 1 Ad. & El. N. C.	
Austen v. Gibbs, 8 T. R. 619	20	525	99, 275, 286
Austin v. Debnam, 3 B. & C. 139 ..	48	Barratt v. Parry, 4 Taunt. 658.....	244
Austin v. Grange, 4 Dowl. 576. 1 Har.		Barrett v. Wilson, 1 Cr. M. & R. 586.	263
& W. 670	283	Barrons v. Luscombe, 1 Har. & W.	
Austin v. Howard, 7 Taunt. 327.....	181, 182	457	215
Avelett v. Goddard, 11 Law J. 123,		Barston v. Trutch, 4 Dowl. 6	296
cp.	263	Bartholomew v. Stevens, et al, 5 Mees.	
Axon v. Dallimore, 3 D. & R. 51....	52, 55	& W. 386	57
Aylett v. Jewell, 2 W. Bl. 1299	18	Bartley v. Musgrave, 1 Dowl. N. C. 325.	248
Aylett v. Lowe, 2 W. Bl. 1221.....	13		
Aylwin v. Todd, 1 Bing. N. C. 170..	118		
Ayrey v. Fearnside, 4 Mees. & W. 163	22		

Table of Cases.

xvii

	PAGE		PAGE
Bartlett v. Bartlett, 11 Law J., 223, cp.	183	Beswick v. Thomas, 5 Dowl. 458....	106
Barton v. Ranson, 3 Mees. & W. 322, 6 Dowl. 384.....	256, 263	Bevan v. Bevan, 3 T. R. 601.....	256, 274, 275
Barton, R. v., 9 Dowl. 1021.....	237	Bevan v. Cheshire, 3 Dowl. 70.....	206
Bartrum v. Williams, 4 Bing. N. C. 301.....	317	Bevan v. Protheck, 2 Burr. 1151....	184
Barwick, Re, 3 Dowl. 703.....	305	Beverley's case, 4 Co. 124.....	204
Baskett v. Barnard, 4 M. & S. 331..	140, 285, 286	Bibbins v. Mantel, 2 Wils. 378.....	225
Bass v. Cooper, 2 Mees. & W. 310..	300	Bicknell v. Weatherall, 1 Ad. & El. N. C. 914.....	86, 120
Bastard v. Gutch, 1 Har. & W. 321, 4 Dowl. 6.....	84, 226	Biddell v. Dowse, 6 B. & C. 255....	236
Bastard v. Smith, 10 Ad. & El. 213. 71, 72		Biddulph v. Gray, 5 Dowl. 406.....	209
Bastard v. Trutch, 5 Nev. and M. 109.	226	Biggs v. Cox, 4 B. & C. 920.....	194
Batchelor v. Dudley, 10 Law J., 72, cp.	41	Bignall v. Gale, 1 Dowl. N. C. 497, 2 Man. & Gr. 830, 364.....	250, 292, 292
Batchelor v. Ellis, 7 T. R. 337.....	137	Bill v. Bannut, 8 Mees. & W. 317..	283
Bate v. Bolton, 2 Dowl. 677.....	114	Billing v. Flight, 6 Taunt. 419.....	118, 123
Bate v. Bolton, 2 Cr. M. & R. 365..	116	Bilton v. Clapperton, 1 Dowl. N. C. 386.....	117
Bates v. Cook, 9 B. & C. 407.....	241	Bilton v. Clapperton, 9 Mees. & W. 473.....	213
Bates v. Lockwood, 1 T. R. 637....	30	Bingham v. Dickie, 5 Taunt. 814....	116
Bates v. Pilling, 2 Cr. & M. 374....	45	Binns v. Pratt, 1 Chit. 369.....	119
Batt v. Vaisey, 1 Price, 116.....	282	Birch v. Triste, 8 East, 412, 139, 141, 147	
Bax v. Jones, 5 Price, 168.....	213	Bird v. Appleton, 1 East, 111.....	22
Baxter v. Bailey, 3 Mees. & W. 415.	225	Bird v. Cooper, 4 Dowl. 148.....	270
Baxter v. Clarke, 2 Cr. M. & R. 734..	210	Bird v. Pegg, 5 B. & A. 418.....	206
Bayley v. Potts, 8 Ad. & El. 272....	94	Bird v. Penrice, 10 Law J., 257, ex. 248	
Baylis v. Lucas, Cowp. 112.....	14	Bird v. Penrice, 6 Mees. & W. 754..	263
Beard v. McCarthy, 9 Dowl. 136.....	111	Birkett v. Holme, 4 Dowl. 556, 1 Har. & W. 659.....	305, 308
Beardmore v. Carrington, 2 Wils. 244.	4	Bishop v. Best, 3 B. & A. 275.....	139
Beare v. Pinkus, 4 Nev. & M. 846..	49	Bishop v. Hatch, 3 Nev. & M. 498..	195
Beaufort, Duke of, v. Welch, 10 Ad. & El. 527.....	268	Bishop v. Hinxman, 2 Dowl. 166....	104
Beaumont v. Dean, 4 Dowl. 354.....	282	Bishop v. Kaye, 3 B. & A. 610.....	22
Bebb v. Wales, 5 Dowl. 458.....	290	Bishop v. Marsh, 8 Dowl. 1.....	55
Beck v. Sargent, 4 Taunt. 232.....	242	Bishop v. Marsh, 9 Law J., 98, cp. 56	
Beckett v. Dutton, 10 Law J., 1, ex. 131		Black v. Cloup, 5 Dowl. 270.....	290
Beckham v. Knight, 7 Dowl. 409....	135	Black v. Sangster, 1 Cr. M. & R. 521, 115	
Beerfield v. Petrie, 2 Tidd, 938....	8	Blackburn v. Kymer, 5 Taunt. 672. 141	
Bell v. Jackson, 4 T. R. 603.....	36, 295	Blackburn v. Stupart, 2 East, 243....	99
Bell v. Oakley, 2 M. & S. 259.....	215	Blackford v. Hawkins, 7 Moore, 800. 275	
Bell v. Thompson, 2 Chit. 194.....	12	Blackhurst v. Bulmer, 5 B. & A. 567. 10	
Bellairs v. Poultney, 6 M. & S. 230..	201	Blackmore v. Flemmyng, 7 T. R. 447. 123	
Bellis v. Beale, 1 Chit. 381.....	188	Blackwell v. Allen, 7 Mees. & W. 146. 282	
Belshaw v. Marshall, 1 Nev. & M. 689	137	Blades v. Arundale, 1 M. & S. 711..	94
Bennett v. Allcot, 2 T. R. 166.....	4	Blake v. Warren, 6 Mees. & W. 151. 67	
Bennett v. Apperley, 6 B. & C. 630. 195		Blanchard v. Lilly, 9 East, 497.....	269
Bennett v. Burton, 9 Dowl. 492....	45	Blanchenay v. Van den Burgh, 1 Brod. & B. 298.....	24
Bennett v. Coker, 4 Burr. 1027.....	197	Bland v. Bland, 1 Har. & W. 167..	4
Bennett v. Neale, 14 East, 343.....	40	Bland v. Drake, 1 Chit. 165.....	272
Bennett v. Nichols, 4 T. R. 121....	141	Bland v. Warren, 7 Ad. & El. 11....	10
Benson v. Schneider, 7 Taunt. 337.. 71, 72		Blandford v. Foote, Cowp. 72.....	229
Bentley v. Hook, 2 Dowl. 339.....	104	Bleasdale v. Darby, 9 Price, 606....	135
Benwell v. Black, 3 T. R. 648.....	139	Bliss v. Johnson, 1 Har. & W. 648..	56
Benwell v. Hinxman, 1 Cr. M. & R. 284.....	246	Blood v. Lea, 3 Wils. 24.....	216
Bernard v. Turner, 1 Mees. & W. 580.	55	Board v. Parker, 7 East, 46.....	53, 55
Berrey v. Lindley, 11 Law J., 27, cp. 148		Bodington v. Harris, 1 Bing. 187....	309
Berry v. Pratt, 1 B. & C. 276.....	72	Body v. Esdaile, 3 Bing. 174.....	20
Best v. Gompertz, 2 Cr. & M. 424..	139	Bollard v. Spencer, 7 T. R. 358....	198
Best v. Prior, 2 Dowl. 189.....	145	Bolton v. Allen, 1 Dowl. N. C. 309..	203, 210

	PAGE		PAGE
Bonafoos v. Schoole, 4 T. R. 316....	230, 225	Bransdon v. Didsbury, 9 Dowl. 19	
Bond v. Bailey, 3 Dowl. 808.....	54	Law J., 10, qb.....	
Bond v. Bailey, 2 Cr. M. & R. 246..	56	Branson v. Didsbury, 12 Ad. & El.	
Bond v. Woodhall, 4 Dowl. 351....	105	Branson v. Moss, 6 Mees. & W.	
Bondfield v. Milner, 2 Burr. 1096....	123	Brashier v. Jackson, 6 Mees. &	
Bonner v. Liddell, 1 Brod. and B. 80.	264	549.....	
Boodle v. Davies, 4 Nev. & M. 788.	248, 260	Brashour v. Russell, 4 Bing. N. C.	
Boomer v. Mellor, 2 Dowl. 533.....	288, 308	Brasswell v. Jeco, 9 East. 316..	
Booth v. Atherton, 6 T. R. 144.....	21	Bray v. Yates, 1 Dowl. 459.....	
Booth v. Holt, 2 H. Bl. 277.....	197	Brazier v. Bryant, 3 Bing. 167..	
Boreman v. Brown, 1 Dowl. N. C. 281.	136	Breach v. Casterton, 7 Bing. 224	
Borer v. Baker, 3 Dowl. 626.....	225	Brewster v. Meeks, 2 Dowl. 612	
Borthwick v. Ravenscroft, 5 Mees. &		Briant v. Clutton, 5 Dowl. 66..	
W. 31.....	276	Bridge & Wright, Re, 4 Nev. & 1	
Borrowdale v. Hitchener, 3 B. & P.	244.....	Bridges v. Walford, 6 M. & S. 4	
251, 259		Bridgewood v. Wynn, 1 Har. &	
Bose v. Sollier, 4 B. & C. 358.....	283	574.....	
Bottomley v. Belkchamber, 1 Har. &		Briggs v. Evelyn, 2 H. Bl. 114..	
W. 362, 4 Dowl. 26.....	277, 289	Briggs v. Sowton, 9 Dowl. 106..	
Bottomley v. Medhurst, 13 Price, 589.	116	Bright v. Durnell, 4 Dowl. 756.	
Boucher v. Roe, 9 Dowl. 329.....	221	Bright v. Eynon, 1 Burr. 390....	
Boucher v. Simms, 2 Cr. M. & R. 392.	233, 310	Broadburt v. Shaw, 2 B. & Ad.	
Boughey v. Webb, 4 Dowl. 320.....	209	Broadhurst v. Darlington, 2 Dowl.	
Bourke v. Lloyd, 3 Dowl. N. C. 452,		Brocher v. Pond, 2 Dowl. 472..	
12 Law J., 4, ex.....	249, 250	Brodhead v. Marahal, 2 W. Bl. 1	
Boutillier v. Thick, 1 D. & R. 363..	263	Broggref v. Hawke, 3 Bing. N. C.	
Bowdler v. Smith, 1 Dowl. 417.....	106	Brooke v. Fearn, 3 Dowl. 114..	
Bowen v. Bramidge, 2 Dowl. 218.....	107	Brook v. Finch, 6 Dowl. 313....	
Bower v. Hill, 5 Dowl. 183.....	19	Brook v. Middleton, 10 East. 26	
Bower, Re, 1 B. & C. 264.....	254, 305	Brook v. Mitchell, 3 Dowl. 392.	
Bower v. Taylor, 3 D. & R. 608 cit.	240	Brooks v. Farlar, 5 Dowl. 361..	
Bowler v. Brown, 3 Dowl. 18, 4 Nev.		Brooks v. Moravia, 2 H. Bl. 224	
& M. 17.....	68	Brookes v. Rigby, 4 Nev. & M. 3	
Bowker v. Nixon, 6 Taunt. 444....	17	Broom v. Stittle, 1 Har. & W. 6	
Box v. Bennett, 1 H. Bl. 432.....	135	Broughton v. Martin, 1 B. & P.	
Boyd v. Emmerson, 4 Nev. & M. 99.	236, 247	Brown's bail, 5 Dowl. 220.....	
Boyd v. Straker, 7 Price, 662.....	281	Brown v. Bailey, 4 Burr. 1929..	
Boys v. Ancell, 5 Bing. N. C. 390....	131	Brown v. Bamford, 9 Mees. & W.	
Brackenbury v. Laurie, 3 Dowl. 180.	30, 105	28,	
Bradbee v. Governor of Christ's Hos-		Brown v. Boyn, 5 Moore, 309..	
pital, 2 Dowl. N. C. 164.....	246	Brown v. Brown, 4 Bing. 38....	
Bradbee v. Mayor of London, 11 Law		Brown v. Croley, 3 Dowl. 386..	
J., 209, cp.....	263	Brown & Croydton Canal Co., 1	
Bradley v. Funstow, 1 B. & P. 34..	250	Ad. & El. 522.....	
Bradley v. Webb, 7 Dowl. 588.....	210	Brown v. Crump, 6 Taunt. 300.	
Bradly v. Windham, 1 Wils. 44.....	89	Brown v. Gardner, 1 Dowl. 426	
Bragg v. Hopkins, 2 Dowl. 151.....	105	Brown v. Ld. Granville, 2 Dowl.	
Bragner v. Langmead, 7 T. R. 20....	85	Brown v. Hudson, 3 Dowl. 4....	
Braine v. Hunt, 2 Dowl. 391.....	292	Brown v. Jenks, 4 Dowl. 581..	
Braly v. Milnes, 1 Bing. N. C. 738..	47	Brown v. Knill, 2 Brod. & B. 3	
Bramah v. Roberts, 1 Bing. N. C. 481.	133	Brown v. Knill, 5 Moore, 164..	
Bramidge v. Adshhead, 2 Dowl. 69..	107	Brown v. Probert, 1 Dowl. 629.	
Brand v. Mears, 3 T. R. 338.....	84	Brown v. Sayce, 4 Taunt. 320..	
Brander v. Penlease, 8 Taunt. 513..	254	Brown v. Smith, 8 Dowl. 867..	
Brandon v. Brandon, 1 B. & P. 304.	255	Brown v. Watson, 3 Dowl. 22..	
Brandon v. Davis, 9 East, 154.....	220	Brown v. Wildbore, 1 Man. & Gr.	
		Brunt v. Wardle, 1 Dowl. N. C.	
		Bryant v. Ikey, 1 Dowl. 428....	
		Brydges v. Smyth, 8 Bing. 29..	
		Buller v. Pinna, 3 Str. 880.....	
		Bullman v. Callow, 1 Chit. 727	

Table of Cases.

xix

	PAGE		PAGE
call v. Hogg, 3 Wils. 146.....	20	Carmichael v. Houchen, 3 Nev. & M.	203
ch v. Pointer, 3 Mees. & W. 310.	67	Carne v. Brice, 7 Mees. & W. 183 ..	93
lehir v. Potter, 9 Mees. & W. 13.	281	Carnarvonshire, JJ. of, R. v., 5 Nev.	& M. 364
bird v. Holloway, 2 D. & R. 362.	116	Carpenter v. Lee, 1 Dowl. N. C. 706..	16
pen. R. v., 8 Ad. & El. 275.....	290	Carr v. Shaw, 7 T. R. 250	117
ch v. Legge, 8 Law J., 258, ex....	118	Carstairs v. Stein, 4 M. & S. 192 ..	17
ph v. Scholefield, 2 Dowl. N. C.	107	Cartier v. Southall, 3 Mees. & W. 128.	290
lin, Ex p., 1 Dowl. N. C. 292..	306	Cartwright v. Cooke, 1 Dowl. 529 ..	59
ley v. Stevens, 4 Dowl. 255, 770.	244, 245, 257	Cartwright v. Blackworth, 1 Dowl.	489
ley v. Stevens, 1 Mees. & W. 156.	246	Carty v. Ashley, 2 W. Bl. 819	117
m v. Bateman, 10 Law J., 467 ex.	63	Casbourn v. Ball, 2 W. Bl. 850	214
m v. Carvalho, 4 Nev. & M. 893.	145	Casey v. Tomlin, 7 Mees. & W. 169..	216
may v. Moxal, 3 Nev. & M. 472 n.	15	Casley v. Smith, 4 Dowl. 477	274
r v. Freethy, 1 Bing. 71	60	Cassell, Re., 9 B. & C. 634.....	242
roughs v. Clarke, 1 Dowl. 48	230	Cassidy v. Stewart, 10 Law J. 57, cp.	9 Dowl. 366
roughs v. Hodgson, 8 Law J. 113,	56	Castle v. Sowerby, 4 Dowl. 609	290
t, Re, 5 B. & C. 668	250	Cates v. West, 2 T. R. 163	139
ton v. Campbell, 6 Dowl. 451 ..	55	Catmur v. Knatchbull, 7 T. R. 448.	217, 305
ton v. Hickey, 6 Taunt. 57	186	Cave v. Massey, 3 B. & C. 735.....	130
ton v. Mendisabel, 1 Dowl. N. C.	257	Cayme v. Watts, 3 D. & R. 224	200
ton v. Thompson, 2 Burr. 664 ..	13	C. D., E. v., 1 Chit. 723	308
ton v. Wigley, 1 Bing. N. C. 605.	264	Cetti v. Bartlett, 1 Dowl. N. C. 928..	100
y v. Clench, 1 Dowl. N. C. 848.	286, 298	Chadwick v. Bunning, 5 B. & C. 632.	52, 53, 56
by v. Fearon, 8 T. R. 235	58, 56	Chadwick v. Trower, 8 Law J. 286, ex.	22
all v. Sydney, 10 Ad. & El. 163.	71	Chaffers v. Glover, 5 Dowl. 81.....	280
lar v. Brown, 1 Brod. & B. 66 ..	46	Chalkley v. Carter, 4 Dowl. 480	316
lar v. Bulkeley, 1 Bing. 238	24	Chambers v. Barnard, 9 Dowl. 557..	282
lar v. Dorant, 3 Taunt. 229	13	Chambers v. Bernasconi, 1 Cr. & J.	459
lar v. Grubb, 3 T. R. 179 cit.....	249	Chambers v. Bryant, 12 Law J. 139, qb.	293
lar v. Hobson, 5 Bing. N. C. 128.	71	Chambers v. Caulfield, 6 East, 244..	5
larton v. Furber, 1 Brod. & B. 517.	186	Chambers v. Coleman, 9 Dowl. 588..	89
ton v. Mingay, 2 Wils. 70	44	Chambers v. Donaldson, 9 East, 470.	202
ard v. Bousfield, 4 Mees. & W.	221, 231	Chamier v. Lllington, 2 Chit. 410	180
8	117	Champion v. Griffiths, 1 Dowl. N. C.	819
ld v. Street, 2 Dowl. 739	239	Chapman v. Bowlby, 8 Mees. & W.	249
s v. Walter, 5 Dowl. 232	299	Chapman v. Eland, 2 New Rep. 82..	315
		Chapman v. Eley, 11 Law J. 320....	16
		Chapman v. Koops, 3 B. & P. 289 ..	93
		Chapman v. Partridge, 2 New Rep. 382.	20
		Chapman v. Snow, 1 B. & P. 132 ..	317
		Charge v. Farkhall, 4 B. & C. 865 ..	301
		Charleton v. Spencer, 12 Law J. 23	qb.
		Charlington v. Meatheringham, 2 Mees.	& W. 142
		Chase v. Westmore, 13 East, 357....	263
		Chaster v. Youlden, 10 Law J. 357 qb.	200
		Chaunt v. Smart, 1 B. & P. 477, 288,	308
		Cheese r. Seales, 12 Law J. 14, ex. 121,	134
		Cheslyn v. Pearce, 4 Dowl. 693.....	283, 293, 296
		Chew v. Lye, 5 Mees. & W. 388	210
		Chick v. Smith, 8 Dowl. 337	85

C.

ell v. Smart, 4 Dowl. 760.....	112
gan v. Kennett, Cowp. 432	93
raft v. Gibbs, 5 T. R. 19.....	2, 12
ert v. Everard, 5 M. & S. 510 ..	54
ert v. Jolliffe, 2 B. & Ad. 418....	95
ert, R. v., 2 Cr. & M. 189 ..	308, 309
den v. Edie, 1 H. Bl. 21.....	139, 309
eron v. Reynolds, Cowp. 407. 64,	94
pell v. French, 6 T. R. 200.....	136
pell v. Cuning, 2 Burr. 1187....	85
am v. Fisk, 2 Tyr. 155	20
a v. Facey, 1 Har. & W. 482,	
Nev. & M. 405	5, 41
al v. Staines, 2 M. & W. 850	76
len v. General Cemetery Comp.,	
Dowl. 425	135
ew v. Edwards, 2 Dowl. 613	193

	PAGE		PAGE
Child v. Marsh, 3 Mees. & W. 433,		Cockburn v. Newton, 10 Law J., 907,	
6 Dowl. 576	318	cp.	907
Children v. Mantering, 8 Dowl. 120.	118	Cockburn v. Newton, 2 Man. & Gr.	899
Chilton v. Ellis, 2 Cr. & M. 459	306	Cocker v. Tempest, 7 Mees. & W. 502.	
Christie v. Hamlet, 5 Bing. 195	280	Cockerill v. Kynaston, 4 T. R. 277.	167
Christie v. Thompson, 1 Dowl. N. C.			981
509	67	Cockshaw, R. v., 2 Nev. & M. 373.	
Christie v. Walker, 1 Bing. 206	116	Cohn v. Davis, 1 H. Bl. 80	36
Churcer v. Stringer, 2 B. & Ad. 777.	253	Collier, R. v., 2 Dowl. 581	1069
Clapham v. Higham, 1 Bing. 67	239	Collier v. Gaillard, 2 W. Bl. 1069 ..	
Clare v. Blakesley, 1 Man. & Gr.		Collins v. Aaron, 4 Bing. N. C. 235.	
567	309	Collins v. Beaumont, 10 Ad. & El. 235.	
Clare v. Cooke, 4 Bing. N. C. 269 ..	50		899
Clare v. Fiestel, 2 Dowl. 617	19	Collins v. Gibbs, 2 Burr. 899	
Claridge v. Crawford, 1 D. & R. 13.	204	Collins v. Goodyer, 2 B. & C. 563 ..	
Claridge v. McKenzle, 12 Law J. 131,		Collins v. Gwynore, 4 Dowl. 122	
cp.	233, 321	Collins v. Poney, 9 East, 322	
Claridge v. Smith, 4 Dowl. 583, 1 Har.		Collins v. Yewens, 8 Law J., 332, qb.	
& W. 687	41, 56	Collinson v. Larkins, 3 Taunt. 1	
Clark v. Chetwode, 1 Har. & W. 635.	108	Colston v. Berens, 3 Dowl. 253	
Clark v. Crofts, 4 Bing. 143	240	Colyer v. Speer, 2 Brod. & B. 67 ..	
Clark v. Dignam, 3 Mees. & W. 319.	306	Combe v. Cutill, 3 Bing. 163	
Clark v. Hamlet, 1 Har. & W. 177..	56	Combe v. Sandon, 1 D. & R. 301 ..	
Clark v. Jones, 3 Dowl. 277	66	Concanen v. Lethbridge, 2 H. Bl.	
Clark v. Martin, 4 Dowl. 222	274	86	
Clark v. Mayor of Berwick, 4 B. & C.		Connell v. Watson, 2 Dowl. 189	
649	64, 184	Cooke v. Allen, 2 Dowl. 11	
Clark v. Morrell et al., 9 Dowl. 461.	130	Cooke v. Barker, 5 Taunt. 164	
Clark v. Nicholson, 6 Car. & P. 712.	124	Cooke v. Birt, 5 Taunt. 765	94
Clark v. Palmer, 9 B. & C. 153	87	Cooke v. Berry, 1 Wils. 98	
Clark v. Stevenson, 2 W. Bl. 808....	18	Cooke v. Hunt, 8 Law J., 216, ex.	
Clarke v. Askew, 8 East, 28	53, 56	5 Mees. & W. 161	
Clarke v. Clement, 6 T. R. 525	96, 100	Cooke v. Lucas, 2 East, 398	
Clarke v. Crockford, 3 Dowl. 693 ..	202	Cooke v. Tunswell, 8 Taunt. 131	
Clarke v. Hamlet, 1 Har. & W. 177..	54	Cooper v. Bliss, 2 Dowl. 749	
Clarke v. Lord, 2 Dowl. 55	106	Cooper v. Folks, 1 Man. & Gr. 942..	
Clarke v. Lord, 2 Dowl. 227	104	Cooper v. Hunchin, 4 East, 521	
Clarke v. Mayor of Berwick, 4 B. & C.		Cooper v. Johnson, 2 B. & A. 394 ..	
649	64	Cooper v. Langdon, 11 Law J., 222,	
Clarke v. Rippon, 1 B. & A. 586....	137	ex. 9 Mees. & W. 60....	207, 208,
Clarke v. Stocken, 5 Dowl. 32, 2 Bing.		Cooper v. Phillips, 3 Dowl. 196	
N. C. 651	240, 290	Cooper v. Sherbrooke, 2 Wils. 116..	
Classey v. Drayton, 6 Mees. & W. 17.	285	Cooper v. Waller, 3 Dowl. 167	
Classey v. Drayton, 8 Dowl. 184	321	Copley v. Day, 4 Taunt. 702	
Cleaver v. Hargrave, 2 Dowl. 689 ..	82	Coren v. Sharp, 1 B. & Ad. 386	
Clement v. Lewis, 3 Brod. & B. 207.	34	Corbet v. Bates, 3 T. R. 680	314,
Clement v. Weaver, 3 Man. & Gr. 551.		Corbet v. Brown, 6 Dowl. 794	
301, 302		Corner v. Shew, 4 Mees. & W. 163..	
Clementson v. Williamson, 1 Bing.		Cornet v. Dempsey, 1 Dowl. N. C. 422.	
N. C. 356	222	Cosby v. Betts, 1 Dowl. N. C. 503 ..	
Cliffe v. Prosser, 2 Dowl. 21	68	Cosgrave v. Evans, 3 Dowl. 443	
Clifford, R. v., 8 D. & R. 53	208	Costello v. Corbett, 4 Bing. 474	
Clothier v. Ess, 2 Dowl. 731. 273,		Coster v. Merest, 3 Brod. & B. 272.	
283, 285		Cotesbatch, R. v., 2 D. & R. 265	
Clutterbuck v. Jones, 16 East, 78 ..	94	Cottle v. Warrington, 5 B. & Ad. 447.	
Coates v. Lord Hawarden, 7 B. & C.		Cotton v. Cadwell, 2 Nev. & M. 399.	
383	217	Coulson v. Graham, 2 Chit. 57	
Coates v. Sandy, 9 Dowl. 381	318	Coutanche v. Le Ruez, 1 East, 133..	
Cobb v. Stokes, 8 East, 358	149	Cowperthwaite v. Owen, 3 T. R. 657.	
Cobbold v. Chilver, 11 Law J., 173,		Cox v. Kitchen, 1 B. & P. 338	
cp.	86		
Cockburn v. Newton, 9 Dowl. 676 ..	249		

Table of Cases.

xxi

	PAGE
<i>McC. Murray</i> , 1 W. Bl. 462	122
<i>McC. Peacock</i> , 4 Dowl. 184	200
<i>McC. Salmon</i> , 2 Mees. & W. 127 ..	308
<i>McC. Thomson</i> , 1 Dowl. 573	60
<i>McC. Tullock</i> , 2 Dowl. 48	316
<i>McC. Tullock</i> , 1 Cr. & M. 531	370
<i>McC. Peter v. Burke</i> , 5 East, 461	317
<i>McC. Cogge</i> , 4 Moore, 65	116
<i>McC. et al., Re</i> , 7 Dowl. 603	255
<i>McC. v. Adney</i> , 1 Cr. & M. 355 ..	264
<i>McC. v. Symons</i> , 1 Bing. 104	268
<i>McC. v. Trigoning</i> , 5 Dowl. 230 ..	122
<i>McC. v. Barrett</i> , 1 Tyr. & Gr. 735,	
1 Cr. M. & R. 919	2
<i>McC. v. Hoghton</i> , 6 T. R. 359 ..	30
<i>McC. v. Packham</i> , 5 Taunt. 630 ..	28
<i>McC. v. Field</i> , 8 Mees. & W. 659 ..	70
<i>McC. v. Harris</i> , 1 Har. & W. 657.	
	54, 55
<i>McC. v. Fothergill</i> , 2 B. & A. 652.	166
<i>McC. v. Miller</i> , 3 Bing. N. C. 975 ..	75
<i>McC. v. Pitman</i> , 5 Taunt. 648	55
<i>McC. v. Curry</i> , 5 Burr. J. P., 70 ..	213
<i>McC. v. Collins</i> , 5 Bing. N. C. 194 ..	
	52, 55
<i>McC. v. Kaye</i> , 6 T. R. 543	122
<i>McC. v. Ebers</i> , 1 Har. & W. 210.	104
<i>McC. v. Field</i> , 8 Dowl. 231	321
<i>McC. v. Bell</i> , 2 Dowl. 608	53, 56
<i>McC. v. Rooke</i> , 1 Wils. 144	122
<i>McC. v. Wagstaff</i> , 1 B. & P. 18 ..	188
<i>McC. v. London Dock Company</i> ,	
1 Cr. & M. 637	264
<i>McC. v. Elwell</i> , 4 Mees. & W. 71 ..	59
<i>McC. v. Pilling</i> , 4 B. & C. 26	101
<i>McC. v. Exp.</i> , 7 D. & R. 774	263
<i>McC. v. Dyche</i> , 2 Chit. 395	54
<i>McC. v. Elwin</i> , 3 Bing. N. C. 882.	319
<i>McC. v. Cohen</i> , 10 East, 46	227
<i>McC. v. Eastend</i> , Barnes, 260	137
<i>McC. v. Pocock</i> , 5 Dowl. 381	107
<i>McC. v. Evans</i> , 10 Law J., 113, cp.	72
<i>McC. v. Bowker</i> , 9 Dowl. 523	320
<i>McC. v. Rickards</i> , 9 Dowl. 845	208
<i>McC. v. Knatchbull</i> , 7 T. R. 448.	254

D.

<i>McC. v. Humphries</i> , 1 Bing. N. C. 412,	
Dowl. 377	108
<i>McC. Costa v. Clarke</i> , 2 B. & P. 376 ..	63
<i>McC. v. Crease</i> , 2 Cr. & M. 223 ..	22, 38
<i>McC. v. Tobin</i> , 2 Marsh. 265	7
<i>McC. v. Birch</i> , 3 Camp. 347	80
<i>McC. v. Arnold</i> , 1 Dowl. N. C. 638.	300
<i>McC. v. Mahon</i> , 4 Bing. N. C. 8	319
<i>McC. v. Barnard</i> , 7 T. R. 251	280
<i>McC. v. Crease</i> , 2 Dowl. 269	38, 60
<i>McC. v. Barnes</i> , 6 Taunt. 5	273
<i>McC. v. Kirkwall</i> , 8 Car. & P. 679 ..	131
<i>McC. v. Beadle</i> , 1 Man. & Gr. 900.	308

	PAGE
<i>McC. Daniell v. Bishop</i> , M'Clel. 61	82, 278
<i>McC. Daniels v. May</i> , 5 Dowl. 83	277
<i>McC. Danser</i> , R. v., 6 T. R. 243	52, 56
<i>McC. D'Argent v. Vivant</i> , 1 East, 380	317
<i>McC. Darling v. Gurney</i> , 2 Dowl. 225	38
<i>McC. Dartnall v. Howard</i> , 2 Chit. 28	134
<i>McC. Daubers v. Pender</i> , 1 Wils. 337	119
<i>McC. Daubuz v. Rickman</i> , 4 Dowl. 129 ..	60
<i>McC. Daubuz v. Rickman</i> , 1 Hodg. 75	248
<i>McC. Davey v. Brown</i> , 1 Bing. N. C.	
460	362
<i>McC. Davey v. Renton</i> , 2 B. & C. 711	46
<i>McC. Davies</i> , Exp. 4 Bing. N. C. 17	120
<i>McC. Davies v. James</i> , 1 T. R. 371	64, 186
<i>McC. Davies v. Jenner</i> , 9 Dowl. 45	200
<i>McC. Davies v. Morgan</i> , 1 Crompt. & J. 587.	8
<i>McC. Davies v. Pierce</i> , 2 T. R. 125	22
<i>McC. Davies v. Rogers</i> , 2 B. & C. 804	200
<i>McC. Davis v. Chippendale</i> , 2 B. & P. 282.	220
<i>McC. Davis v. Cole</i> , 9 Law J., 258, ex. 6	
M. & W. 624	41
<i>McC. Davis v. Cottle</i> , 3 T. R. 405	297
<i>McC. Davis v. Dunn</i> , 11 Law J., 16, qb.,	
1 Dowl. N. C. 317	128
<i>McC. Davis v. James</i> , 1 T. R. 371	64
<i>McC. Davis v. Norton</i> , 1 Bing. 138	38
<i>McC. Davis v. Owen</i> , 1 B. & P. 342	318
<i>McC. Davis v. Skerlock</i> , 7 Dowl. 530	319
<i>McC. Davis v. Stanbury</i> , 3 Dowl. 440	274
<i>McC. Davis v. Taylor</i> , 2 Chit. 268	18
<i>McC. Davis v. Vass</i> , 15 East, 97	255
<i>McC. Davison v. Gauntlett</i> , 3 Man. & Gr.	
550	246
<i>McC. Dawson v. Garrett</i> , 2 Dowl. 624	249
<i>McC. Dawson v. Wills</i> , 10 Mees. & W. 662.	283
<i>McC. Dawson v. Wood</i> , 3 Taunt. 256	92
<i>McC. Day v. Bonnin</i> , 3 Bing. N. C. 219 ..	266
<i>McC. Day v. Clarke</i> , 5 Bing. N. C. 117 ..	50
<i>McC. Day v. Hawks</i> , 3 T. R. 654	62
<i>McC. Day v. Mearns</i> , 2 Chit. 156	54
<i>McC. Day v. Norris</i> , 11 Law J., 62, ex. ..	250
<i>McC. Day v. Picton</i> , 10 B. & C. 120	47
<i>McC. Day v. Waldoek</i> , 1 Dowl. 523	104
<i>McC. Deacon v. Morris</i> , 2 B. & A. 393	64
<i>McC. Dean v. Whittaker</i> , 1 Car. & P. 347.	92
<i>McC. Dean v. Howey</i> , 7 Dowl. 318	262
<i>McC. De Bastos v. Wilmott</i> , 1 Hodg. 15 ..	113
<i>McC. Deemer v. Brooker</i> , 1 Har. & W. 206,	
3 Dowl. 576	226
<i>McC. Deemer v. Brooker</i> , 4 Dowl. 9	83
<i>McC. Deever v. Swaby</i> , 10 Law J., 328,	
qb.	237
<i>McC. Defries v. Davis</i> , 1 Bing. N. C. 692, 3	
Dowl. 629, 1 Hodg. 103	207
<i>McC. Defries v. Snell</i> , 4 Dowl. 680	54, 56
<i>McC. Delaney v. Cannon</i> , 10 East, 322	315
<i>McC. Delisser v. Towne</i> , 1 Ad. & El. N. C.	
333	60, 70
<i>McC. Delper v. Barnes</i> , 1 Taunt. 48	263
<i>McC. Dempster v. Purnell</i> , 1 Dowl. N. C.	
168, 11 Law J., 33, cp.	145
<i>McC. Denn v. Rawlings</i> , 10 East, 261	148

	PAGE		PAGE
Dennett v. Pass, 1 Bing. N. C. 638, 3		Doe v. Board, 12 Law J., 12, ex., 1	
Dowl. 632, 1 Hodg. 157	307	Dowl. N. C. 526	
Dennie v. Elliott, 1 H. Bl. 587	110	Doe v. Boast, 7 Dowl. 487	
Denny v. Trapnel, 2 Wils. 578	14	Doe v. Boulton, 6 M. & S. 148	
De Rouffigny v. Peale, 3 Taunt. 484	9	Doe v. Bradley, 1 Dowl. N. C. 226	
De Rutzen v. Farr, 1 Har. & W. 735,			168
5 Nev. & M. 617	3	Doe v. Bransom, 6 Dowl. 490	
De Tastet v. Rucker, 3 Brod. & B. 65	127	Doe v. Brown, 8 D. & R. 100	
Devaynes v. Boys, 7 Taunt. 33	214	Doe v. Brown, 5 B. & C. 394	
Devereux v. John, 1 Dowl. 548	105	Doe v. Browne, 8 East, 166	
Devon, Sh. of, R. v., 3 Dowl. 10	310	Doe v. Butcher, 2 Chit. 174	
Dew v. Katz, 8 Car. & P. 315	118	Doe v. Butler, 2 Esp. 589	
Dewdney v. Palmer, 7 Dowl. 177	7	Doe v. Canfield et ux., 6 Dowl. 523	
De Woolfe v. —, 2 Chit. 14	286	Doe v. Carter, 8 Bing. 330	
Dias v. Freeman, 5 T. R. 195	182, 183	Doe v. Chamberlaine, 9 Law J., 38 ex.	
Dibbin v. Marquis of Anglesea, 2 Cr.		Doe v. Chaplain, 3 Taunt. 120	
& M. 722	270	Doe v. Church, 3 Camp. 71	
Dicas, Exp., 2 Dowl. 92	287	Doe v. Clark, 12 Law J., 69, qb. ..	
Dicas v. Warne, 1 Hodg. 91	305	Doe v. Cooper, 1 M. & Gr. 135	
Dickenson v. Blake, 7 Bro. P. C. 177, 6, 8		Doe v. Cooper, 8 T. R. 645	
Dickenson v. Heseltine, 2 M. & S. 210	141	Doe v. Copeland, 2 T. R. 779	
Dickins v. Jarvis, 5 B. & C. 528,		Doe v. Creed, 5 Bing. 327	
254, 256, 267		Doe v. Crick, 5 Esp. 196	
Dickinson v. Plaisted, 7 T. R. 474,		Doe v. Crisp, 5 Esp. 196	
122, 124		Doe v. Darton, 3 East, 149	
Digby v. Alexander, 1 Dowl. 713, 99, 217		Doe v. Davis, 1 Esp. 358	
Dignam, R. v., 4 Dowl. 359	305	Doe v. Dobell, 1 Ad. & El. N. C. 806	
Dillamore v. Capon, 1 Bing. 388,		Doe v. Dodd, 2 Nev. & M. 838	
53, 56, 297		Doe v. Dolman, 7 T. R. 618	
Dillon v. Kimmer, 1 Bing. 100	55	Doe v. Donovan, 1 Taunt. 565	
Dixon v. Dixon, 2 B. & P. 443	141	Doe v. Donston, 1 B. & A. 230	
Dixon v. Ensell, 2 Dowl. 621	105	Doe v. Dyer, 3 Dowl. 600	
Dixon v. Graham, 5 Dowl. 267	7	Doe v. Edwards, 2 Dowl. 471	
Dixon v. Thorold, 8 Mees. & W. 297	37	Doe v. Edwards, 7 Dowl. 547	
Dixon v. Walker, 7 Id. 214	75	Doe v. Errington, 4 Dowl. 602, 1 Har.	
Dobbins v. Green, 2 Dowl. 509	105	& W. 502	60,
Doble v. Cummins, 7 Ad. & El. 580	106	Doe v. Errington, 3 Nev. & M. 640	
Doctor v. Stanley, 9 Law J., 199, cp.		Doe v. Figgins, 3 Taunt. 440	
15, 276		Doe v. Fillis, 2 Chit. 170	
Dodding v. Hudson, 1 Bing. 384	261	Doe v. Ford, 2 Smith, 407	
Doddington v. Ballard, 8 Law J.,		Doe v. Franklin, 7 Taunt. 9	
331, cp.	263	Doe v. Fry, 2 Dowl. 265	
Doddington v. Hudson, 1 Bing. 410,		Doe v. Gee, 9 Dowl. 612	
464, 8 Moore, 510	304, 306, 309	Doe v. Godwin, 10 Law J., 275, qb.	
Doddington et al., Re, 8 Law J., 331,		Doe v. Gray, 10 B. & C. 615	
cp.	242	Doe v. Grubb, 5 B. & C. 457	
Doddington et al., Re, 5 Bing. N. C.		Doe v. Grundy, 1 B. & C. 284	
591	246	Doe v. Haddon, Hullock's Costs, 401	
Dodson v. Warne, 1 Dowl. N. C. 848	204	Doe v. Hazell, 1 Esp. 94	
Doe v. Alsop, 9 B. & C. 780	111	Doe v. Heather, 1 Dowl. N. C. 64, 10	
Doe v. Amoy, 8 Mees. & W. 565	257	Law J., 296, ex.	
Doe v. Archer, 14 East, 245	150	Doe v. Hilder, 2 B. & A. 782	
Doe v. Armfield, 1 Dowl. N. C. 327	168	Doe v. Hickman, 1 Man. & Gr. 566	
Doe v. Armitage, 1 D. & R. 173	119	Doe v. Hilliard, 5 Car. & P. 132	
Doe v. Badtittle, 1 Chit. 215	155	Doe v. Hillier, 12 Law J., 166, qb.	
Doe v. Barker, 2 Cr. & M. 234	109	Doe v. Hitchcock, 2 Dowl. N. C. 1	
Doe v. Bayliss, 6 T. R. 765	155	Doe v. Hodgson, 12 Ad. & El. 135	
Doe v. Baytop, 1 Har. & W. 270	292	Doe v. Horner et al., 8 Ad. & El. 235	
Doe v. Bell, 5 T. R. 471	148	260,	
Doe v. Bennett, 4 B. & C. 897	167	Doe v. Howard, 11 East, 498	
Doe v. Benson, 1 Dowl. 15	208	Doe v. Huddart, 4 Dowl. 457	
Doe v. Birchmore, 8 Law J., 108, qb. 168		Doe v. Hughes, 7 Mees. & W. 139, 146	

Table of Cases.

xxiii

	PAGE		PAGE
v. Hughes, 4 Dowl. 412, 1 Gale,	160, 170	Doe v. Roe, 2 Dowl. 184	158
v. Hughes, 2 Cr. M. & R. 281..	166	Doe v. Roe, 2 Dowl. 186	151
v. Hurst, 1 Chit. 62	155	Doe v. Roe, 2 Dowl. 190	163
v. Jessop, 3 B. & Ad. 402	175	Doe v. Roe, 2 Dowl. 198	158
v. Johnson, 7 Dowl. 550	300	Doe v. Roe, 2 Dowl. 199	154
v. Jones, 11 Law J., 50, ex.....	91	Doe v. Roe, 2 Dowl. 413	174
v. King, 2 Dowl. 580.....	153	Doe v. Roe, 2 Dowl. 414	158
v. Lambly, 2 Esp. 635	150	Doe v. Roe, 4 Dowl. 173	161
v. Lea, 11 East, 312	150	Doe v. Roe, 5 Dowl. 409	282
v. Leach, 3 Man. & Gr. 329	150	Doe v. Roe, 5 Dowl. 447	276
v. Leach, 10 Law J., 291, cp. .	131	Doe v. Roe, 6 Dowl. 629	152
v. Lloyd, 12 Law J., 95, qb. .	273	Doe v. Roe, 1 D. & R. 433	178
v. Lord, 6 Dowl. 256	171	Doe v. Roe, 1 D. & R. 514	156
v. Lord, 7 Ad. & El. 610	111	Doe v. Roe, 1 D. & R. 563	154
v. Lord Grey de Wilton, 2 East,	150	Doe v. Roe, 8 D. & R. 592	153
v. Lucas, 5 Esp. 193	151	Doe v. Roe, 2 Tyr. 211	157
v. Miller, 1 Chit. 536	118	Doe v. Roe, 2 Tyr. 724	163, 164
v. Milward, 3 Mees. & W. 328.	150	Doe v. Ross, 7 Mees. & W. 102	3
v. Mirehouse, 2 Dowl. 200	171	Doe v. Rotherham, 3 Dowl. 690, 1	176, 178
v. Moore, 6 Bing. 656	178	Gale, 157	170, 178
v. Moore, 7 Bing. 194	141	Doe v. Rushworth, 6 Dowl. 712	170
v. Moore, 2 Chit. 176	156	Doe v. Salter, 3 Taunt. 485	169
v. Noden, 2 Esp. 580	148	Doe v. Saunders, 3 B. & Ad. 783	244
v. Owens, 1 Dowl. N. C. 404, 13	216	Doe v. Sinclair, 5 Dowl. 26	112
v. Law J., 53, ex.....	149	Doe v. Sinclair, 3 Bing. N. C. 778	208
v. Pasquali, Peake, 166	126, 127	Doe v. Smith, 8 Ad. & El. 253	17
v. Perkins, 3 T. R. 749	909	Doe v. Smith, 3 Dowl. 379	160
v. Peyton, 7 Dowl. 671	149	Doe v. Smythe, 4 M. & S. 347	167
v. Phillis, 2 Chit. 170	175	Doe v. Snape, 1 Dowl. 814	106
v. Phillips, 6 T. R. 597	8, 20	Doe v. Snee, 2 D. & R. 5	157
v. Pike, 1 Nev. & M. 385	118	Doe v. Snowden, 2 W. Bl. 1224	150
v. Pilkington, 4 Burr. 2447	149	Doe v. Spence, 6 East, 120	150
v. Porter, 3 T. B. 13	246	Doe v. Spiller, 6 Esp. 70	150
v. Powell, 7 Dowl. 539	148	Doe v. Squire, 2 Dowl. N. C. 327	258
v. Pullen, 3 Hodg. 39	149	Doe v. Stagg, 9 Law J., 133, ex....	14
v. Quigley, 2 Camp. 505	149	Doe v. Stennett, 2 Esp. 217	148
v. Rafter, 6 Esp. 4	148, 149	Doe v. Stilwell, 6 Dowl. 305	256, 273
v. Read, 19 East, 57	149	Doe v. Stilwell, 2 Dowl. N. C. 18	310
v. Rendell, 1 Chit. 535	119	Doe v. Summersett, 1 B. & Ad. 135	149
v. Reynolds, 10 B. & C. 481	208	Doe v. Sybourne, 2 Esp. 877	149
v. Richardson, 6 Taunt. 697, 261, 267	161	Doe v. Tricknell, M. S. B. 2197	36
v. Roe, 4 B. & A. 658	153	Doe v. Trussel, 6 East, 505	216
v. Roe, 5 B. & C. 704	282	Doe v. Tuckett, 2 B. & A. 773	119
v. Roe, 1 Chit. 228	153	Doe v. Tyler, 6 Bing. 561	3
v. Roe, 2 Cramp. & J. 330	166	Doe v. Walker, 7 T. R. 478	148, 150
v. Roe, 1 Dowl. 23	161	Doe v. Walters, 10 B. & C. 620	149
v. Roe, 1 Dowl. 67	155	Doe v. Want, 8 Taunt. 647, 2 Moore, 722	273
v. Roe, 1 Dowl. 295	155	Doe v. Ward, 2 Mees. and W. 65	208
v. Roe, 1 Dowl. 365	157	Doe v. Watkins, 7 East, 551	150
v. Roe, 1 Dowl. 428	154	Doe v. Watts, 7 T. R. 83	148
v. Roe, 1 Dowl. 495	163	Doe v. Webber, 1 Har. & W. 10, 4	59, 60
v. Roe, 1 Dowl. 518	154	Nev. & M. 381	59, 60
v. Roe, 1 Dowl. 613	159	Doe v. Williams, Cowp. 622	149
v. Roe, 1 Dowl. 614	156	Doe v. Williams, 6 B. & C. 41	149
v. Roe, 1 Dowl. 692	158	Doe v. Wipple, 1 Esp. 360	169
v. Roe, 1 Dowl. 693	155	Doe v. Witherwick, 3 Bing. 11	179
v. Roe, 2 Dowl. 12	158	Doe v. Wrightman, 4 Esp. 5	150
v. Roe, 2 Dowl. 99	156	Doe v. Wylde, 2 B. & A. 472	11
v. Roe, 2 Dowl. 180	178	Doe v. —, 1 Dowl. 69	208
		Doe d. Agar v. Roe, 6 Dowl. 624	157
		Doe d. All Souls College v. Roe, 2	
		Har. & W. 138	153

	PAGE		PAGE
Doe d. Ashman v. Roe, 1 Bing. N. C.	152	Doe d. Dobler v. Roe, 2	383
253	152	Doe d. Downes v. Roe,	671
Doe d. Baddam v. Roe, 2 B. & P. 55.	155	.....	671
Doe d. Bailey v. Roe, 1 B. & P. 360.	157	Doe d. Elderton v. Roe,	585
Doe d. Baring v. Roe, 6 Dowl. 456..	162	.....	585
Doe d. Barles v. Roe, 5 Dowl. 447..	162	Doe d. Elwood v. Roe,	840
Doe d. Barrow v. Roe, 1 Man. & Gr.	238	Doe d. Emerson v. Roe	840
.....	160	Doe d. Emsley v. Roe,	840
Doe d. Barth v. Roe, 4 Bing. N. C.	675	Doe d. Evans, v. Roe,	840
.....	163	Doe d. Evans v. Roe, 2 D.	840
Doe d. Bass v. Roe, 7 T. R. 469, 119,	153	Doe d. Faithful v. Roe,	840
Doe d. Bath, Marquis of, v. Roe,	7 Dowl. 692	.....	840
.....	156	Doe d. Fell v. Roe, 1	777
Doe d. Beard v. Roe, 1 Mees. & W. 360.	178	.....	777
Doe d. Boullott v. Roe, 7 Dowl. 463,	8 Law J., 254, ex.	Doe d. Field v. Roe, 2	777
.....	155	Doe d. Field v. Roe, 1 H	777
Doe d. Bradford, Earl, v. Roe, 5 B. &	A. 770.	Doe d. Finch v. Roe, 5	777
.....	173	Doe d. Fisher v. Roe, 10	21
Doe d. Bremner v. Roe, 8 Dowl. 135.	156	.....	21
Doe d. Brickfield v. Roe, Dowl.	N. C. 270	Doe d. Fitzwygram v.	N. C. 672
.....	159	Doe d. Folkes v. Roe, 2	777
Doe d. Briggs v. Roe, 1 Dowl. 312..	155	Doe d. Forbes v. Roe, 5	777
Doe d. Brook v. Roe, 9 Dowl. 347..	151	Doe d. Forbes v. Roe, 5	777
Doe d. Brown v. Roe, 6 Dowl. 270..	162	Doe d. Frith v. Roe, 3	777
Doe d. Burlton v. Roe, 7 T. R. 477..	164	Doe d. Frith v. Roe, 2	777
Doe d. Burrows v. Roe, 7 Dowl. 326.	161	Doe d. Frodsham v. Roe	777
Doe d. Butler v. Roe, 2 Har. & W.	131	Doe d. Frost v. Roe, 3	777
.....	166	Doe d. Frost v. Roe, 3	777
Doe d. Cardigan v. Roe, 1 D. & R.	540	Doe d. Frost v. Roe, 8	777
.....	175	Doe d. George v. Roe,	541
Doe d. Carter v. Roe, 12 Law J.,	27, ex.	Doe d. Gibbard v. Roe,	87
.....	176	.....	87
Doe d. Caulfield v. Roe, 3 Bing. N. C.	329	Doe d. Gibbard v. Roe,	87
.....	178	Doe d. Giles v. Roe, 7	777
Doe d. Chadwick v. Roe, 9 Dowl.	492	Doe d. Gillett v. Roe, 5	777
.....	162	Doe d. Ginger v. Roe,	777
Doe d. Chaffey v. Roe, 9 Dowl. 100..	157	Doe d. Ginger v. Roe,	777
Doe d. Channell v. Roe, 9 Dowl. 67.	152	Doe d. Gore v. Roe, 3	777
Doe d. Charles v. Roe, 2 Dowl. 752.	174	Doe d. Gowland v. Roe	777
Doe d. Childers v. Roe, 2 Har. & W.	121	Doe d. Gowland v. Roe	777
.....	159	Doe d. Graff v. Roe, 6	777
Doe d. Clothier v. Roe, 6 Dowl. 291.	157	Doe d. Grange v. Roe,	274
Doe d. Colson v. Roe, 6 Dowl. 765..	160	.....	274
Doe d. Coopers' Company v. Roe,	8 Dowl. 134	Doe d. Graves v. Roe,	274
.....	161	Doe d. Gray v. Roe, 7	777
Doe d. Courthorpe v. Roe, 2 Dowl.	441	Doe d. Grimes v. Roe,	671, 4 Dowl. 86
.....	154	.....	671, 4 Dowl. 86
Doe d. Cousins v. Roe, 8 Law J.,	69, ex., 7 Dowl. 53	Doe d. Grocers' Comj	5 Taunt. 205
.....	162, 273	Doe d. Halsey v. Roe,	777
Doe d. Cox v. Roe, 4 Esp. 185.	150	Doe d. Harcourt v. Roe,	777
Doe d. Croly v. Roe, 2 Dowl. N. C.	344	Doe d. Harris v. Roe,	Har. & W. 372.
.....	159	Doe d. Harris v. Roe,	704
Doe d. Crooks v. Roe, 6 Dowl. 184..	151	Doe d. Hartford v. Roe	852
Doe d. Croone v. Roe, 6 Dowl. 270..	164	.....	852
Doe d. Daniell v. Woodroffe, 7 Dowl.	494, 8 Law J., 254, ex.	Doe d. Harvey v. Roe,	777
.....	155	.....	777
Doe d. Darwent v. Roe, 3 Dowl. 336.	119, 153		
Doe d. Davies v. Roe, 1 B. & C. 118.	168, 170		
Doe d. Dickens v. Roe, 7 Dowl. 121..	161		
Doe d. Dimond v. Roe, 8 Dowl. 308.	153		

Table of Cases.

XIV

PAGE	PAGE
Doe d. Hebblethwaite v. Roe, 3 T. R. 788, n. 167	Doe d. Norman v. Roe, 2 Dowl. 428, 399 161
Doe d. Hewson v. Roe, 5 Dowl. 404. 157	Doe d. Norris v. Roe, 1 Dowl. 547. 175
Doe d. Hicks v. Roe, 1 Dowl. N. C. 180 174	Doe d. Nottage v. Roe, 1 Dowl. N. C. 750 158
Doe d. Hindle v. Roe, 3 Mees. & W. 279 161	Doe d. Oldham v. Roe, 4 Dowl. 714. 155
Doe d. Hubbard v. Roe, 1 Har. & W. 371 159	Doe d. Osbaldiston v. Roe, 1 Dowl. 450 161
Doe d. Hulme v. Roe, 8 Law J., 16, cp. 163	Doe d. Pamphillon v. Roe, 1 Dowl. N. C. 186 155
Doe d. Hutchinson v. Roe, 2 Dowl. 418. 157	Doe d. Parr v. Roe, 1 Ad. & El. N. C. 700 160, 320
Doe d. Isherwood v. Roe, 2 Nev. & M. 476 153	Doe d. Pate v. Roe, 1 Taunt. 55 171
Doe d. Jackson v. Roe, 4 Dowl. 609. 155	Doe d. Peach v. Roe, 6 Dowl. 62 ... 152
Doe d. Jenkins v. Roe, 5 Dowl. 155. 163	Doe d. Pearson v. Roe, 5 Moore, 73. 152
Doe d. Jenks et al. v. Roe, 2 Dowl. 55. 162	Doe d. Phillips v. Roe, 5 B. & A. 766 175, 178
Doe d. Johnson v. Roe, 12 Law J., 97, qb. 161	Doe d. Portland, Duke of, v. Roe, 3 Man. & Gr. 307. 154
Doe d. Johnson v. Roe, 1 Dowl. N. C. 483 162	Doe d. Potter v. Roe, 1 Hodg. 216 ... 161
Doe d. Jones v. Roe, 1 Chit. 213. 158, 160	Doe d. Powell v. Roe, 9 Dowl. 548. 174
Doe d. Jones v. Roe, 5 Dowl. 223 ... 155	Doe d. Prescott v. Roe, 1 Dowl. 274. 301
Doe d. Jordan v. Roe, 4 Dowl. 577 ... 157	Doe d. Probert v. Roe, 3 Dowl. 335. 154
Doe d. Kirschner v. Roe, 7 Dowl. 97. 161	Doe d. Pryme v. Roe, 8 Dowl. 340. 178, 273
Doe d. Levi v. Roe, 7 Dowl. 102. 163	Doe d. Pugh v. Roe, 1 Hodg. 6 ... 174
Doe d. Ld. Aylesbury v. Roe, 2 Chit. 183 162	Doe d. Reud v. Roe, 1 Mees. & W. 633 158
Doe d. Ld. Darlington v. Cock, 4 B. & C. 259 157, 161	Doe d. Reeve v. Roe, 1 Gale, 15 163
Doe d. Ld. Dinorben v. Roe, 2 Mees. & W. 374 158	Doe d. Rigby v. Roe, 4 Dowl. 14. 155
Doe d. Ld. Southampton v. Roe, 1 Hodg. 24 155	Doe d. Robinson v. Roe, 3 Dowl. 11. 161
Doe d. Lowndes v. Roe, 10 Law J., 143, ex. 160	Doe d. Rogers v. Roe, 2 Dowl. 392. 152
Doe d. Luff v. Roe, 3 Dowl. 575. 159	Doe d. Ross v. Roe, 5 Dowl. 147 ... 161
Doe d. Macdougall v. Roe, 4 Moore, 20 157	Doe d. Roupel v. Roe, 1 Har. & W. 367 161
Doe d. Malarchy v. Roe, 9 Law J., 53, qb. 297	Doe d. St. Margaret, Westminster, v. Roe, 1 Moore, 113 153
Doe d. Marshall v. Roe, 4 Nev. & M. 553 157	Doe d. Schovel v. Roe, 3 Dowl. 691. 161
Doe d. Martin v. Roe, 1 Har. & W. 46, 1 Hodg. 223 157, 167	Doe d. Scott v. Roe, 8 Dowl. 254. 161
Doe d. Mingay v. Roe, 6 Dowl. 182. 150	Doe d. Shepherd v. Roe, 10 Law J., 129, qb. 158
Doe d. Mitchell v. Roe, 1 Har. & W. 646 155, 158	Doe d. Shepherd v. Roe, 2 Chit. 171. 152
Doe d. Moody v. Roe, 8 Dowl. 306. 159	Doe d. Showell v. Roe, 2 Cr. M. & R. 42 161
Doe d. Morgan v. Roe, 3 Bing. 169. 133	Doe d. Simons v. Roe, 1 Chit. 228 ... 156
Doe d. Morgan v. Roe, 1 Dowl. N. C. 543 157	Doe d. Simpson v. Roe, 6 Dowl. 469. 152
Doe d. Morgan v. Roe, 2 Mees. & W. 423 164	Doe d. Elee v. Roe, 8 Dowl. 60. 163
Doe d. Morpeth v. Roe, 3 Dowl. 577. 159	Doe d. Smith v. Roe, 5 Dowl. 254 ... 152
Doe d. Mordlake v. Roe, 2 Dowl. 444. 160	Doe d. Smith v. Roe, 4 Dowl. 285 ... 157
Doe d. Nash v. Roe, 8 Dowl. 305 ... 154	Doe d. Smith v. Roe, 1 Dowl. 614 ... 158
Doe d. Neale v. Roe, 2 Wils. 263 ... 154	Doe d. Smithers v. Roe, 4 Dowl. 374. 151
Doe d. Neville v. Roe, 2 Dowl. N. C. 330 162	Doe d. Somers, Earl, v. Roe, 8 Dowl. 202 162
Doe d. Newman v. Roe, 9 Dowl. 131. 152	Doe d. Stainton v. Roe, 6 M. & S. 203. 152
	Doe d. Sturch v. Roe, 1 Har. & W. 672 158
	Doe d. Talbot v. Roe, 1 Har. & W. 367. 155
	Doe d. Tatham v. Wright, 1 Har. & W. 729 3
	Doe d. Thompson v. Roe, 3 Dowl. 575. 163
	Doe d. Thompson v. Roe, 4 Dowl. 115. 167

Table of Cases.

xxvii

	PAGE
Robertson, 5 Mees. & W.	219
R. v., 4 Burr. 2105	310
owley, 8 Dowl. 145	288
okes, 2 Dowl. 820	193
owerby, 1 B. & C. 287	139
cob, 9 Dowl. 345	209
Hopkins, 7 Dowl. 146	196
Exp., 2 Dowl. 568	287
v., 4 Burr. 2129	311
Nicklin, 5 Price, 641	14
sparrow, 1 Har. & W. 370	275
les, 5 Dowl. 255	306
ason, 8 Law J. 196, qb.	16
Wildman, 3 Taunt. 236	6
irby, 1 Dowl. N. C. 946	56
v. Bird, M'Clel. 69	1
rummond, 4 Bing. 415	21
v. Martin, 2 M. & S. 384	137
Howard, 1 Dowl. N. C. 426	127
den, 7 Bing. 258	259
Fairfax, 8 Ad. & El. 296	59
Griffin, 11 Ad. & El. 186	126
v. Dunbar, 2 Dowl. 202	85
v. Eyre, 5 B. & Ad. 68	128
v. Morgan, 1 Dowl. 422	290
Twisden, 2 Bing. N. C. 268	198
Twisden, 8 Law J. 128, cp.	274, 288
ynne, 1 Cr. & M. 532	46
ynne, 2 Dowl. 23	49
Brown, 4 Bing. N. C. 162	126, 127
Davis, 6 Dowl. 465	87, 234
n v. Kemp, 1 Chit. 727	275
Lemnitre, 2 Wils. 367	22
tkins, 4 T. R. 555	99
lander, 2 H. Bl. 547	181
hester, 2 Mees. & W. 847	204
Javis, 1 Gale, 150	239
Javis, 1 Cropp. & J. 460	205
p., 9 Dowl. 106	305
ryer, 10 Ad. & El. 609	131
Millard, 3 Dowl. 661, 1	306
ugh, 2 Dowl. 360	87
tees, 12 Ad. & El. 167	30
tees, 1 Dowl. N. C. 388	83
enor, 5 Taunt. 692	122
twete, 2 Bing. 326	140
Taylor, 2 Dowl. 349	98
Thompson, 5 East, 189, 238	240
v. Salisbury, 3 Bing. N. C.	106
Wharton, 5 M. & S. 321	217
orpe, 6 Dowl. 768	59, 70

F.

Mostyn, 2 W. Bl. 929	2, 4
v. Cock, 3 Burr. 1771	7

	PAGE
Falkland's, Lord, case, 1 Tidd, 194	206
Fall v. Fall, 2 Dowl. 88	288
Falmouth, Earl, v. Roberts, 1 Dowl.	
N. C. 633, 11 Law J. 180, ex.	6
Farley v. Briant, 1 Har. & W. 775	198
Farmer v. Darling, 4 Burr. 1971	4
Farncombe v. Kent, 2 Dowl. 464	238
Farr v. Newman, 4 T. R. 621	92
Farrall v. Dale, 2 Dowl. 15	291
Farrant v. Olmins, 3 B. & A. 692	
	3, 13, 20
Farrant v. Thompson, 5 R. & A. 826	91
Faulkner v. Haaslar, 9 Dowl. 138	209
Feise v. Parkinson, 4 Taunt. 640	7
Fenn, Exp., 2 Dowl. 527	208
Fenn v. Roe, 1 New Rep. 293	161
Fenny v. Durrant, 1 B. & A. 40	98
Fenton v. Dimes, 9 Law J. 297 qb.	268
Ferguson v. Norman, 4 Bing. N. C.	
52	248
Ferguson v. Norman, 8 Law J., 3 cp.	263
Ferrers v. Weal, 2 Moore, 215	124
Fewster v. Boggett, 9 Mees. & W. 20	75
Fidlett v. Bolton, 4 Dowl. 282	291
Field v. Cope, 1 Dowl. 567, 2 Tyr.	
458	106
Fieldhouse v. Croft, 4 East, 510	90
Fife v. Bruere, 4 Dowl. 329	234
Figg v. Wedderburne, 11 Law J., 45, qb. 10	
Figgins v. Ward, 2 Dowl. 364	200
Pilewood v. Clement, 6 Dowl. 508	101
Filmer v. Delber, 3 Taunt. 486	236
Finch v. Brook, 5 Dowl. 50	24, 83
Finch v. Cocker, 2 Dowl. 363	276
Finlayson v. M'Leod, 1 B. & A. 663	348
Finley v. Jowle, 13 East, 6	205
Finnerty v. Smith, 1 Bing. N. C. 649	282
Finnerty v. Smith, 1 Hodg. 158	299
Firley v. Rallatt, 2 Dowl. 708	318
Firth v. Robinson, 1 B. & C. 277	
	248, 250
Fisher v. Aide, 3 Mees. & W. 486	58
Fisher v. Berryll, 11 Law J. 130 qb.	72
Fisher v. Dudding, 9 Dowl. 872	24
Fisher v. M'Namara, 1 B. & P. 292	225
Fisher v. Pimbley, 11 East, 188	264
Fisher v. Stanhope, 1 T. R. 464	227
Fitch v. Green, 2 Dowl. 439	293
Fitzpatrick v. Pickering, 2 Wils. 68	56
Fitzwilliam, Ld. v. Maxwell, 7 Taunt.	
31	189
Fleetwood v. Taylor, 6 Dowl. 700	15
Fleming v. Davies, 5 D. & R. 371	54
Flight v. Gloesop, 1 Hodg. 123	194
Flower v. Adams, 8 Dowl. 292	16
Fogarty v. Smith, 4 Dowl. 595	208
Fomin v. Oswell, 1 M. & S. 593	52, 55
Fonerau v. —, 3 Wils. 59	12
Foot v. Coare, 2 B. & P. 588	56
Foot v. Dick, 1 Har. & W. 207	233
Forbes v. Simmons, 9 Dowl. 37	54
Ford v. Baynton, 1 Dowl. 357	104

PAGE	PAGE
Ford v. Dilly, 5 B. & Ad. 865, 2 Nev. & M. 622	Fussell v. Silcox, 5 Taunt. 628
106	397
Ford v. Jones, 3 B. & Ad. 248	Fynn v. Kemp, 2 Dowl. 620
242	319
Ford v. Nassau, 1 Dowl. N. C. 631, 11 Law J. 287, ex.	G.
233	
Ford v. Nassau, 9 Mees. & W. 793 ..	Gadderer v. Sheppard, 4 Dowl. 577 ..
310	230
Forbes v. Diemar, 7 T. R. 661	Gainsford v. Blachford, 6 Price, 36 ..
273	6
Forester v. Dale, 1 Dowl. 412	Gale v. Leckie, 6 M. & S. 228
63	216
Forster v. Cookson, 1 Ad. & El. N. C. 419	Gale v. Williamson, 8 Mees. & W. 405
95	98
Forster v. Kirkwall, 4 Dowl. 370 ..	Gale v. Winks, 5 Dowl. 348
303	301
Fortescue, Exp., 2 Dowl. 448	Gambrell v. Earl of Falmouth, 5 Ad. & El. 403
306	37
Fortescue v. Jones, 1 Dowl. 524	Gameson, R. v., 6 Mees. & W. 603 ..
321	313
Fosbrook v. Holt, 4 Dowl. 700	Gandell v. Roger, 4 B. & C. 862
65	275
Fosbrook v. Holt, 1 Mees. & W. 205 ..	Gardner v. Cover, 1 Gale, 45
215	68
Foss v. Racine, 4 Mees. & W. 610, 216 ..	Gardner v. Green, 3 Dowl. 343
217	239
Fossett v. Godfrey, 2 Dowl. 587	Gardner v. Walker, 3 Anst. 935
55, 56	117
Fost v. Conre, 2 B. & P. 588	Gardner v. Williams, 3 Dowl. 796 ..
62	139
Foster v. Hilton, 1 Dowl. 85	Gardner v. Holt, 2 Str. 1217
65	305
Foster v. Jolly, 1 Cr. M. & R. 703 ..	Gardner v. Carlisle, 4 Bing. N. C. 7 ..
17	98
Foster v. Laidler, 4 B. & C. 116	Garland v. Jekyll, 2 Bing. 330
138	78
Foster v. Pointer, 8 Mees. & W. 395 ..	Garlick v. Ballinger, 10 Price, 124 ..
43	393
Foster v. Steele, 3 Bing. N. C. 892 ..	Garrat v. Hooper, 1 Dowl. 28
3	316
Foster v. Weston, 6 Bing. 527	Garratt v. Mantell, 2 Wils. 380
48	223
Fothergill v. Walton, 4 Bing. 711 ..	Garrick v. Jones, 2 Dowl. 157
234	110
Fotherell v. Philby, 2 Burr. 1451	Gaunt v. Taylor, 11 Law J., 68, cp. ..
227	35
Foulkes v. Burgess, 2 Mees. & W. 849	Gawler v. Jolley, 1 H. Bl. 74
224	85
Foulkes v. Neighbour, 1 Marsh. 21 ..	Gaylor v. Farrant, 4 Bing. N. C. 286 ..
59	133
Fourdrinier v. Bradbury, 3 B. & A. 328	Gee v. Swann, 11 Law J., 291, ex. ..
10	9
Fowell v. Petre, 5 Dowl. 276 ..	George v. Elston, 3 Dowl. 410
233, 318	111
Fox v. Money, 1 B. & P. 250	George v. Fry, 4 Dowl. 273
316	309
Foxall v. Bankes, 5 B. & A. 536	George v. Lonsley, 8 East, 13
41	247
Foy v. Percy, 1 T. R. 592	Gethin v. Wilks, 2 Dowl. 189
230	108
Frame v. White, 9 Law J. 387 cp.	Gibbons v. Spalding, 12 Law J., 186, ex.
23	303
France v. Campbell, 9 Dowl. 914 ..	Gibbs v. Pike, 10 Law J., 309, ex., 1 Dowl. N. C. 409
91	31
France v. White, 3 Dowl. 53	Gibbs, R. v., 3 Dowl. 345
263	188
France v. Wright, 3 Dowl. 325	Gibbs v. Trevanion, 8 Dowl. 140
307	141
Francis v. Doe, 4 Mees. & W. 331, 5 Id. 272	Gibson v. Humphrey, 1 Cr. & M. 544 ..
145	196
Franks v. Wicks, 9 Dowl. 489	Gifford v. Gifford, Forrest, 80
273	256
Frankum v. Earl Falmouth, 4 Dowl. 65	Gilbert v. Burtenshaw, Cowp. 230 ..
58	4
Frankum v. Earl Falmouth, 4 Nev. & M. 330	Gilbert v. Pape, 2 Mees. & W. 311 ..
132	306
Fraser v. Moses, 1 Dowl. N. C. 705 ..	Gildart v. Gladstone, 12 East, 668 ..
40	145
Fream v. Pinneger, Cowp. 23	Gillet v. Green, 7 Mees. & W. 347 ..
258	43
Freeman v. Arkell, 3 Br. & B. 404 ..	Gilson v. Carr, 4 Dowl. 618
2	293
Freeman v. Cockell, 1 Car. & P. 137 ..	Gingell v. Bean, 1 Man. & Gr. 50 ..
128	394
Freeman v. Garden, 1 D. & R. 184 ..	Gingell v. Bean, Id. 555
141	397
Freeman v. Weston, 1 Bing. 321	Gingell v. Turnbull, 3 Bing. N. C. 881 ..
225	183
Freer v. Cooper, 6 Taunt. 358	Giraud v. Austen, 1 Dowl. N. C. 703 ..
117, 118	304
Frescobaldi v. Kinaston, 2 Str. 783 ..	Gisborne v. Hart, 5 Mees. & W. 50 ..
206	263
Fricker v. Eastman, 11 East, 319 ..	Gist v. Mason, 1 T. R. 84
301	13
Frost v. Hayward, 10 Mees. & W. 673 ..	Gladman v. Bateman, Barnes, 418 ..
281	206
Fuller v. Coombe, 1 Dowl. 207	Gladwin v. Chilcote, 9 Dowl. 550 ..
142	251, 261
Fuller v. Prentice, 1 H. Bl. 49	Glasier v. Cooke, 5 Nev. & M. 680 ..
309	106
Fulwood v. Annis, 3 B. & P. 321 ..	Glaister v. Hewer, 8 T. R. 69
116	110
Furneaux v. Fotherby, 4 Camp. 136 ..	Glenville v. Hutchins, 1 B. & C. 91 ..
57	45, 47
Furnival v. Stringer, 3 Bing. N. C. 96	Glover v. Watmore, 5 B. & C. 709 ..
227, 229, 233	306

Table of Cases.

XXIX

	PAGE		PAGE
Birt, 2 Chit. 394	52	Grant, Exp., 3 Dowl. 390	308
v. Harris, 7 Bing. 390	195	Grant v. Flower, 5 Dowl. 419	319
Marsden, 6 Bing. 433	232	Grant v. Fry, 8 Dowl. 334	381
Freeman, 2 Cr. M. & R.	198	Grant, R. v., 3 Nev. & M. 106	3, 18
Lloyd, 4 Dowl. 157, 1 Gale,	54, 56	Grant v. Smith, 5 Dowl. 107	144
Applewell, 2 T. R. 707	122	Grater v. Collard, 6 Dowl. 503	2, 14
Scarborough, 2 Har. & W.	319, 320	Gravall v. Stimpson, 1 B. & P. 478,	157, 141
v. Ld. Sefton, 3 Anst. 808, 4	4	Gravenor v. Woodhouse, 1 Bing. 38	2
by v. Southcott, 1 Wils. 243	34	Gray v. Cook, 8 East, 336	50
pte v. Petrie, 5 T. R. 224	199	Gray v. Cookson, 16 East, 13	214
v. Denton, 1 Dowl. 623	48	Gray v. Cox, 5 B. & C. 459	21
Watkins, 3 East, 495	44	Gray v. Grant, 2 Wils. 353	4
Vilks, 6 M. & S. 413	310	Gray v. Gwennap, 1 B. & A. 106	266
Vilks, 2 Tidd, 881	244	Gray v. Leaf, 3 Dowl. 654	399
Ensall, 3 Dowl. 743	89	Greatwood v. Sims, 2 Chit. 369	20
Ray, 4 Dowl. 1, 1 Har. &	69	Green v. Austin, 3 Camp. 260	95
v. Bowman, 2 Dowl. 206, 34, 63	208	Green v. Bolton, 4 Bing. N. C. 308	56
v. Robings, 3 Bing. N. C. 1. 208	90	Green v. Brown, 3 Dowl. 337	105
v. Chase, 1 B. & A. 297	306	Green v. Foster, 2 Dowl. 191	227, 228
v. London, 2 Dowl. 504	284	Green v. Glassbrook, 2 Bing. N. C. 143	130
v. Turley, 2 Cr. M. & R.	115, 284	Green v. Kettibby, 9 Law J., 223, ex. 125	308
v. Turley, 4 Dowl. 431	317	Green v. Light, 3 Dowl. 578	137
v. Wright, 1 Str. 33	906	Green v. Okill, 1 Dowl. 423	305
v. Badtittle, 4 Taunt. 890	167	Green v. Prosser, 2 Dowl. 99	117, 121
d. Duke of Norfolk v. No-	176	Green v. Rennett, 1 T. R. 782	235
B. & A. 149	91	Green v. Rohan, 4 Dowl. 659	13
v. Jones, 7 T. R. 52	216	Green v. Speakman, 8 Moore, 339	39
v. May, 1 Tidd, 94	126	Greenfell v. Pierson, 1 Dowl. 406	84
v. Otway, 8 East, 357	140	Greenshields v. Harris, 9 Mees. & W.	774
v. Woodward, 3 B. & A. 689	158	Greenshields v. Pritchard, 1 Dowl.	234
d. Mortimer v. Notitle, 2 D.	157	N. C. 51, 10 Law J., 295, ex.	234
d. Read v. Badtittle, 1 B.	162	Greenshields v. Pritchard, 8 Mees. &	229
d. Roberts v. Badtittle, 1 B.	163	W. 148	306
d. Wakelin v. Badtittle,	205	Greenwood v. Dyer, 5 Dowl. 255	40
P. 120	315	Greenwood v. Johnson, 3 Dowl. 006,	242
v. Moore, Cro. Car. 161	209	1 Har. & W. 184	40
v. Parry, 4 T. R. 577	217	Greenwood et al, Re, 9 Ad. & El. 699	242
Twine, 4 Dowl. 560	234	Growtham v. the Hund. of Theale,	50
Orphew, 8 Dowl. 137	236	3 Burr. 1723	3
right, 1 Dowl. N. C. 864	50	Gregory v. Tufts, 1 Cr. M. & R. 310	12
Fute, 7 Mees. & W. 142	73	Gregory v. Tufts, 2 Dowl. 711	246
Archer, 1 Har. & W. 559	217	Greig v. Talbot, 2 B. & C. 179	63
Archer, 5 Nev. & M. 523	217	Griffiths v. Davies, 8 T. R. 460	57
im v. Lane et al., 1 Mees.	315	Griffiths v. Jones, 2 Cr. M. & R. 333	63
36	55	Griffiths v. Jones, 1 Mees. & W. 731	57
Barnes, 3 Taunt. 504	141	Griffiths v. Kynaston, 2 Tyr. 757	66
Collier, 1 Smith, 334	40	Griffiths v. Liversedge, 2 Dowl. 143	47
Holmstrom, 7 East, 580	233, 232	Griffiths v. Poinson, 2 Nev. & M. 675	19
Beaumont, 5 Dowl. 40	53, 55	Griffith v. Williams, 1 Crompt. & J. 47	127
Browne, 1 Dowl. 309	13	Grimes v. Joseph, 2 Brod. & B. 35	74
Shopper, 2 Dowl. 644	220	Grimes v. Naish, 1 B. & P. 480	192
Moore, 4 Dowl. 456	305	Grindell v. Goodman, 5 Dowl. 378	95
Fry, 5 Dowl. 21	30	Groom v. Wortham, 12 Law J., 89,	39
		cp.	209
		Groombridge v. Fletcher, 2 Dowl. 355	124
		Grout v. Glasier, 1 Dowl. N. C. 53	251
		Grover v. Fitzroy, 3 Dowl. 29	132
		Grundy v. Mell, 1 New. Rep. 28	
		Grundy v. Wilson, 7 Taunt. 709	
		Guest v. Elwes, 5 Ad. & El. 118	

PAGE	PAGE
Guiseppi v. Haynes, 10 Law J., 425, ex. 222, 233	Harley v. Greenwood, 5 B. & A. 95. 11
Gulliver v. Summerfield, 5 Dowl. 401. 257	Harper v. Abrahams, 4 Moore, 3. 21
Gurford v. Bailey, 11 Law J., 105 cp. 130	Harper v. Carr, 7 T. R. 448. 21
Gurney v. Buller, 1 B. & A. 670. 186	Harris v. Davis, 1 Chit. 623. 14
Gurney v. Butler, Id. 250	Harris v. Duncan, 4 Nev. & M. 63. 4
Gwillim v. Baker, 1 Price, 274. 95	Harris v. Griffith, 4 Dowl. 289, 1 Har. & W. 515. 27
Gwillim v. Holbrook, 1 B. & P. 410. 182	Harris v. Jones, 3 Burr. 1451. 14
Gyde v. Boucher, 2 Har. & W. 127, 5 Dowl. 127. 270	Harris v. Lloyd, 4 M. & S. 171. 54, 1
	Harris v. Matthews, 4 Dowl. 608. 284, 32
H.	Harris v. Parker, 3 Dowl. 451. 26
Hadlock v. Williams, 7 Dowl. 927. 282	Harris v. Thomas, 2 Mees. & W. 32. 28
Haigh v. Conway, 15 East, 1. 315	Harris v. Turtle, 6 Mees. & W. 258. 28
Haine v. Davey, 2 Har. & W. 30. 13	Harrison v. Bainbridge, 2 B. & C. 800. 11
Halden v. Glasscock, 5 B. & C. 390. 235	Harrison et ux. v. Almond, 1 Har. & W. 119, 4 Dowl. 321. 28
Hale v. Castleman, 1 W. Bl. 2. 305	Harrison v. Grote, 6 T. R. 400. 14
Halford v. Smith, 4 East, 567. 39	Harrison v. Harrison, 9 Price, 89. 7, 1
Halkead v. Abrahams, 3 Taunt. 81. 134	Harrison v. King, 1 B. & A. 161. 136, 13
Hall v. Alderson, 2 Bing. 476. 264	Harrison v. Paynter, 6 Mees. & W. 387. 9
Hall, Exp., 8 Law J., 211, qb. 115, 284	Harrison, R. v., 6 T. R. 60. 27
Hall v. Forget, 1 Dowl. 606. 46, 48	Harrison v. Ward, 3 Dowl. 541. 36
Hall v. Hinds, 2 Man. & Gr. 847. 203	Harrison v. Wardle, 2 Nev. & M. 703. 18
Hall v. Lawrence, 4 T. R. 589. 242	Harsant v. Larkin, 3 Brod. & B. 257. 52, 5
Hall v. Middleton, 1 Har. & W. 7, 4 Nev. & M. 398. 15	Hart v. Cutbush, 2 Dowl. 456. 5
Hall v. Ody, 2 B. & P. 28. 109	Hart v. Volans, 1 Dowl. 484. 19
Hall v. Redington, 5 Mees. & W. 605. 321	Hartley v. Hodson, 1 Moor, 814. 11
Hall v. Bouse, 4 Mees. & W. 24. 245	Harvey v. Gilbard, 7 Dowl. 616. 4
Hall, R. v., 2 W. Bl. 1110. 310	Hasker v. Jarmaine, 1 Cr. & M. 408. 28
Hall v. Stothard, 2 Chit. 267. 7	Havens v. Bannister, 1 Wils. 7. 11
Hallet v. Hallett, 5 Mees. & W. 25. 245	Hawes v. Saunders, 3 Burr. 1584. 14
Halliday v. Fitzpatrick, 4 Taunt. 875. 116	Hawkins v. Colclough, 2 Burr. 274. 24
Halton v. Stoking, 2 Tyr. 165. 321	Hawkins v. Jones, 5 Taunt. 204. 12
Ham v. Philcox, 1 Bing. 142, 7 Moore, 521. 275	Hawkins v. Snuggs, 2 M. & S. 476. 14
Hamley v. Hutton, 5 Dowl. 332. 55	Hayllar v. Ellis, 6 Bing. 225. 266, 28
Hammond v. Navin, 1 Dowl. N. C. 351. 120	Haynes v. Powell, 3 Dowl. 599. 24
Hanbury v. Ella, 3 Nev. & M. 438. 130	Hayter v. Moat, 2 Mees. & W. 56. 4
Handasyde v. Morgan, 2 Wils. 144. 141	Haythorne v. Bush, 2 Dowl. 641. 16
Handford v. Handford, 6 Dowl. 473. 124	Hayward v. Gifford, 4 Mees. & W. 194. 8
Handley v. Levy, 8 B. & C. 637. 51	Hayward v. Phillips, 1 Nev. & P. 288, 6 Ad. & El. 119. 259, 26
Hannah v. Wyman, 3 Dowl. 673. 287	Hazlewood v. Buck, 9 M. & W. 1. 4
Hannott v. Farettes, Barnes, 275. 189	Hazlewood v. Thatcher, 3 T. R. 350. 11
Hansen v. Shackleton, 4 Dowl. 48. 316	Head v. Baldrey, 8 Ad. & El. 605. 4
Hanslow v. Wilks, 5 Dowl. 295. 15	Heald v. Hall, 2 Dowl. 163. 6
Hanson v. Blakey, 4 Bing. 493. 193	Heale v. Erle, 2 Mees. & W. 383. 4
Harborough, Earl of, v. Shardlow, 2 Mees. & W. 265. 19	Heane v. Battersby, 3 Dowl. 213. 4
Harding v. Austen, 8 Moore, 523. 293	Heaton v. Whittaker, 4 East, 349. 253, 2
Harding v. Forshaw, 1 Mees. & W. 415. 269	Heenan v. Evans, 11 Law J., 1, cp. 1
Harding v. Watts, 15 East, 556. 241	Hefford v. Alger, 1 Taunt. 218. 14
Hardinge v. Hall, 10 Mees. & W. 42. 196	Heming v. English, 1 Cr. M. & R. 568.
Hardy v. Bern, 5 T. R. 540, 636. 22	Hemson v. Speange, 2 Smith, 195. 11
Hardy v. Cathcart, 1 Marsh. 180. 30	Henchett v. Kimpson, 2 Wils. 140. 4
Hardy v. Ryle, 8 B. & C. 603. 212	Henfree v. Bromley, 6 East, 309. 2
Hare, Re, 8 Dowl. 71. 240	Henley v. Mayor of Lyme Regis, 6 Bing. 195. 14
Hare, R. v., 13 East, 189. 272, 281	Henllam, Exp., 7 Price, 594. 2
	Herbert v. Darley, 4 Dowl. 726. 319, 3
	Herbert v. Williamson, 1 Wils. 324. 11

Table of Cases.

xxxii

	PAGE		PAGE
hire, Sh. of, R. v., 5 Dowl.		Hodgson v. Forster, 2 D. & R.	221...
Har. & W. 122.....	108	Hodgson v. Gascoigne, 5 B. & A.	88. 92, 95
Jordan, Doug. 382.....	53	Hodgson v. Milles, 2 Tidd, 1195....	135
gton v. Robinson, 4 Mees. &		Hodgson v. Walker, Whitw.....	292
.....	243	Hodsoll v. Wise, 4 Mees. & W.	536. 243
gton v. Robinson, 8 Law J.,		Hodson v. Drewry, 7 Dowl.	500....
.....	261, 267	Hodson v. Pennell, 4 Mees. & W.	373.....
Pigott, 8 Bing. 61.....	110	.....	315
Hewitt, 1 Ad. & El. N. C.		Hodson v. Wilde, 7 Dowl.	15.....
.....	269	Hofford v. Alger, 1 Taunt.	218.....
Mantell, 2 Wils. 372.....	194	Hogg v. Graham, 4 Taunt.	136.....
Melton, 1 Cr. & M. 579.		Holden v. Newman, 13 East, 161.	52, 56
.....	229, 230	Holder v. Raith, 4 Nev. & M.	466... 46
Crutchley, 5 Taunt. 277... 4,	11	Hole v. Finch, 2 Wils.	293.....
Cr. & P. 574. 262		Holland v. Brooks, 6 T. R.	161.....
v. Payrer, 1 Dowl. N. C.		Holliday v. Lawes, 3 Bing. N. C.	774. 111
.....	317	Hollingsworth v. Briggs, 4 Dowl.	643. 123
, 8 Taunt. 694.....	203	Hollis v. Smith, 10 East, 293.....	198
Kents, 6 D. & R. 68.....	22	Holloway v. Bennett, 3 T. R.	448.... 126
Richardson, 1 B. & P. 63.		Holloway & Monk, Re, 8 Dowl.	138. 258
.....	250, 253	Holmes v. Edwards, 6 Dowl.	51.... 295
Wilkes, 1 Dowl. 447.....	37	Holmes v. Grant, 1 Gale, 59.....	285
Evans, 2 Str. 837.....	135	Holmes v. Holmes, 2 Bing. 75.....	73
Warry, 6 T. R. 654.....	199	Holmes v. Mentze, 4 Dowl.	300, 5
v. Jessop, 9 Dowl. 203.....	246	Nev. & M. 563.....	104
Wilkins, 8 Dowl. 139.....	273	Holmes v. Murcott, 1 Bing.	431.... 230
v. Baker, 1 Cr. & M. 611..	120	Holmes v. Senior, 7 Bing. 162.....	291
Hills, 2 Dowl. 696.....	319	Holroyd v. Breare, 4 B. & A.	43, 100. 110
alter, 2 Dowl. 380.....	11, 15, 129	Holt v. Scholefield, 6 T. R.	691..... 22
alter, 2 Cr. & M. 420.....	131	Horne v. Bentick, 1 Brod. & B.	514. 144
occombe, 9 Dowl. 336.....	247	Hooper v. Cobb, 2 Tidd, 941.....	12
ebb, 1 New. Rep. 298.....	137	Hooper v. Hooper, 1 Mc'Cl. & Y.	500.....
ownsend, 3 Taunt. 45.....	252	.....	264
Spilsbury, 1 Dowl. 421.....	137	Hopcraft v. Fernor, 1 Bing.	379.... 253
Fowler, 5 Dowl. 312.....	5	Hopkins v. Davies, 1 Cr. M. & R.	846.....
Hopwood, 1 Marsh, 66.....	255	.....	252
v. Jones, 4 Dowl. 86.....	303	Hopkinson v. Buckley, 8 Taunt.	74. 281
v., 1 Tyr. 347.....	195	Hoppell v. Leigh, 5 Dowl.	40..... 75
Birch, 8 Taunt. 26.....	6	Horn v. Ion, 4 B. & Ad. 78.....	193
Blades, 5 Taunt. 225.....	181	Horne v. Hughes, 8 East, 317.....	53, 55
sh v. Chandler, 7 Taunt. 488.	206	Horsfall v. Matthewman, 3 M. & S.	154.....
v. Russell, 13 East, 232.....	200	.....	282
Stevens, 4 Dowl. 283.....		Horsley, R. v., 5 T. R.	362..... 311
.....	315, 319, 320	Horston v. Shilliter, 6 Moore,	490.... 118
r v. Layng, 4 B. & C. 863..	55	Horton v. Stamford, 2 Dowl.	96.... 117
Kemp, 5 Nev. & M. 113, 3		Hoskins v. Ld. Berkely, 4 T. R.	402. 189
El. 676.....	34, 88	Houlditch v. Earl of Lichfield, 12	
k v. Smith, 5 Dowl. 248....	289	Law J., 80, cp.....	217
Matthews, 2 Dowl. 149.....	202	Hounsfield v. Drury, 11 Ad. & El.	98.....
Hill, 1 Chit. 27.....	293	.....	101
Ferrars, 6 Dowl. 779... 241,	250	House v. The Thames Commission-	
v. Paterson, 2 Dowl. N. C.		ers, 3 Brod. & B. 117.....	63
.....	311, 312	Howard v. Brown, 4 Bing. 393.....	281
Pritchard, 5 Dowl. 300.....	302	Howard v. Sowerby, 1 Taunt.	103... 188
v. Warrand, 7 East, 50.....	53	Howarth v. Samuel, 1 B. & A.	566... 26
son v. Hodgkinson, 3 Nev.		Howell v. Bulteel, 3 Dowl.	99 n.... 303
64.....	117	Howell v. Harding, 8 East, 362.....	111
son v. Walley, 2 Tyr. 174....	84	Howell v. Morris, 1 Wils. 79.....	188
v. Caley, 8 Dowl. 318.....	299	Howell v. Strattan, 2 Smith, 65.....	34
v. Dowell, 3 Mees. & W.		Howell v. Thomas, 7 Car. & P.	342. 139
.....	317	Howorth v. Hubbersty, 3 Dowl.	455,
v. Foster, 1 B. & C. 110....	10	1 Gale, 47.....	279

	PAGE		PAGE
Huber v. Steiner, 2 Dowl. 781.....	124	Jackson v. Chard, 2 Dowl. 468.....	14
Hucker v. Gordon, 1 Cr. & M. 58....	181	Jackson v. Clark, 1 M'Clel & Y	200
Huckle v. Money, 2 Wils. 205.....	4	Jackson v. Clarke, 13 Price, 208....	208
Hudson v. Majoribanks, 1 Bing. 393..	20	Jackson v. Elam, 1 Dowl. 515.....	515
Huggitt v. Parkin, 1 Bing. 65.....	295	Jackson v. Ford, 3 Wils. 14.....	14
Hughes v. Brand, 2 Dowl. 131.....	301	Jackson v. Galloway, 8 Law J., 20, c	20
Hughes v. Budd, 8 Dowl. 315.....	5	Jackson v. Hallam, 2 B. & A. 317..	317
Hughes v. Chitty, 2 M. & S. 172....	57	Jackson v. Inhab. of Colleswort	1 T. R. 71
Hughes v. Morley, 1 B. & A. 22.....	193	Jackson v. Williamson, 2 T. R. 28	28
Hughes v. Walden, 5 B. & C. 770....	300, 322	Jackson v. Yabsley, 5 B. & A. 848	848
Hullusson v. Staples, 2 Doug. 438....	72	Jacob's case, 4 Burr. 2502.....	2502
Humphreys v. Griffiths, 6 Mees. & W.	89	Jacob v. Hungate, 3 Dowl. 456....	456
Humphreys v. Jones, 6 Mees. & W.	418	Jacob v. Phillips, 2 Dowl. 716....	716
Humphrey v. Woodhouse, 3 Dowl.	-416, 1 Bing. N. C. 506.....	James v. Askew, 8 Ad. & El. 351..	351
Hunt v. Hunt, 5 Dowl. 442.....	215	James v. Atwood, 5 Bing. N. C. 62	62
Hunt v. Kendrick, 2 W. Bl. 836....	120	James v. Dawson, 1 Dowl. 341....	341
Hunt v. Pasman, 4 M. & S. 329....	120	James v. Francis, 5 Price, 1.....	1
Hunt v. Pussmore, 2 Dowl. 414.....	87	James v. Swift, 4 B. & C. 681....	681
Hunt v. Round, 2 Dowl. 553.....	183	James v. Westdale, 9 Dowl. 104....	104
Hunter v. Campbell, 3 B. & A. 273..	218	Jameson v. Raper, 3 Moore, 65....	65
Hunter v. Hornblower, 3 Dowl. 491..	9	Jameson, Re., 2 Har. & W. 35....	35
Huntig v. Ralling, 8 Dowl. 879.....	261	Jaques v. Nixon, 1 T. R. 280, 137, 1	137, 1
Huntingtower, Ld. v. Heeley, 7 D. & R.	309	Jefferies v. Shepherd, 3 B. & A. 69	69
Hurst, Re, 1 Har. & W. 275.....	266	Jeffery v. Bastard, 6 Nev. & M. 30	30
Hussey v. Jordan, 1 Doug. 382 n....	56	Jeffries v. Watts, 1 New Rep. 153.	153
Hussey v. Wilson, 5 T. R. 254.....	316	Jenkins v. Bates, 2 Str. 1015.....	1015
Hutchins v. Hutchins, Andr. 297....	256	Jenkins v. Law, 8 T. R. 87.....	87
Hutchinson v. Birch, 4 Taunt. 619..	94	Jenkins v. Mason, 3 Moore, 325....	325
Hutchinson v. Blackwell, 8 Bing. 381.	264	Jenkins v. Phillips, 9 Car. & P. 76	76
Hutchinson v. Johnson, 1 Tyr. 729..	89	Jenkins, Re, 11 Law J., 71, qb....	71
		Jenkins, Re, 1 Dowl. N. C. 276....	276
		Jenkinson v. Moreton, 1 Mees. & W.	300
		Jenkinson v. Norton, 5 Dowl. 74....	74
		Jenks v. Taylor, 1 Mees. & W. 578	578
		Jenney v. Cutts, 1 New Rep. 308..	308
		Jephson v. Hawkins, 2 Man. & Gr. 36	36
		Jervis v. Jones, 1 Har. & W. 63	63
		Jeyes v. Hay, 1 Man. & Gr. 890....	890
		Jeynes v. Stevenson, Bul. N. P. 19	19
		Jezeph v. Ingram, 8 Taunt. 838....	838
		Jobson v. Foster, 1 B. & Ad. 6....	6
		Joddrel v. —, 4 Taunt. 253.....	253
		Johnson v. Beale, 8 Law J., 255, e	255
		5 Mees. & W. 276.....	276
		Johnson v. Berrisford, 2 Cr. & 1	222
		Johnson v. Bray, 2 Brod. & B. 698	698
		Johnson v. Jebb, 3 Burr. 1772....	1772
		Johnson v. Kennedy, 4 Dowl. 345	345
		Johnson v. Lakeman, 2 Dowl. 646	646
		Johnson v. Lawson, 2 Bing. 341....	341
		Johnson v. Marriatt, 2 Dowl. 34	34
		Johnson v. Piper, 2 Nev. & M. 673	673
		Johnson v. Toulmin, 4 East, 173..	173
		Johnson v. Wells, 2 Cr. & M. 428	428
		Johnstone v. Huddleston, 4 B. &	922
			922

J.

Jackman v. Cotton, 5 Mees. & W.
147, 8 Law J., 223, ex. 54, 55

Table of Cases.

xxxiii

	PAGE
me v. Knowles, 1 Dowl. N. C.	298, 301
v. Mundy, 8 Law J., 100, ex.	20
v. Greening, 5 T. R. 529 ..	52, 56
v. Atherton, 7 Taunt. 56	389
v. Barnes, 2 Mees. & W. 313..	41
v. Bond, 5 Dowl. 455	41
v. Corry, 5 Bing. N. C. 187 ..	263
v. Dale, 9 Price, 591	12
v. Danvers, 5 Mees. & W. 234.	228
v. Edwards, 3 Mees. & W. 218.	114, 122
v. Elridge, 1 Dowl. N. C. 710.	276
v. Fitzadams, 1 Cr. & M. 855.	209
v. Fowler, 4 Dowl. 232	122
v. Gurdon, 11 Law J., 45, m..	214
v. Harris, 1 Dowl. 433	55
v. Harris, 1 Dowl. 374	56
v. Hawkes, 10 Ad. & El. 32 ..	265
v. Jelu, 5 Dowl. 130, 3 Har. &	19
v. Lake, 8 Car. & P. 305	40
v. Marsh, 4 T. R. 464	151
v. Powell, 6 Dowl. 489	249
v. Price, 1 East, 81	317
v. Price, 2 Dowl. 410	220
v. Roberts, 2 Dowl. 656	68
v. Roberts, 2 Dowl. 374	69
v. Roberts, 2 Dowl. 698	123
R. v., 8 Dowl. 307	287
v. Sparrow, 5 T. R. 257	4
v. Thomas, 9 Law J., 16, qb..	41
v. Tobin, 4 Bing. N. C. 123. 72,	73
v. Tubb, 1 Wils. 337	141
v. Tye, 1 Dowl. 181	228
v. Vaughan, 5 East, 445	215
v. Williams, 6 M. & S. 178 ..	197
v. Williams, 1 Car. & P. 459, 680.	213
v. Williams, 11 Ad. & El. 175,	257
v. Berwick, 9 Mees. & W. 3 ..	53
v. Berwick, 1 Dowl. N. C. 271.	337
v. Strong, 5 M. & S. 196	55
v. Grayson, 1 Cr. M. & R. 523.	249, 261
v. Grayson, 3 Dowl. 189	263

K.

v. Rigg, 1 B. & P. 11	53, 56
v. Austin, 7 Bing. 601	140
v. Deardon, 8 East, 298	141
v. Deeble, 3 B. & C. 491	46
v. Minter, 1 Bing. N. C. 721..	92
v. Dickinson, 1 Dowl. 540. 209,	210
v. Flint, 5 Dowl. 293	125
v. Wrother, 2 Chit. 109	275
v. Potter, 6 Taunt. 549	198
v. Richardson, 2 Moore, 238 ..	65
and v. Macauley, Peake, 66..	89
and v. Macauley, 4 T. R. 436.	139
v. Derrett, 3 Camp. 510	150

	PAGE
Kemsett v. West, 5 D. & R. 626....	50
Kennard v. Harris, 2 B. & C. 801 ..	259
Kennet and Avon Canal Company v.	
Jones, 7 T. R. 451	317
Kenney v. Hutchinson, 6 Mees. & W.	134
134	301
Kenny v. Bishop, 9 Dowl. 57	321
Kenrick v. Phillips, 7 Mees. & W.	415
415	265
Kent v. Elstob, 3 East, 18	203
Kent v. Jones, 3 Dowl. 210	269
Kenworthy v. Peppiat, 4 B. & A. 298.	117
Kenyon v. Grayson, 2 Smith, 61....	307
Kernot v. Norman, 2 T. R. 300	204
Kerr v. Jeston, 1 Dowl. N. C. 538 ..	240
Kerr v. Liston, 1 Dowl. N. C. 340 ..	258
Key v. Hill, 2 B. & A. 508	183
Kidd v. Mason, 3 Dowl. 98	52, 56
Kidd v. Rawlinson, 2 B. & P. 59	93
Kinder v. Dunford, 10 Law J., 131, qb.	192
Kinder v. Paris, 2 H. Bl. 561	133
King v. Birch, 11 Law J., 183, qb....	80
King v. Clifton, 5 T. R. 437....	188, 308
King v. Horne, 4 T. R. 349	317
King v. Joseph, 5 Taunt. 452	273
King v. Packwood, 2 Dowl. 570	306
Kingston v. Llewellyn, 1 Brod. & B.	529
529	316
Kingwell v. Elliot et al., 7 Dowl. 423,	8 Law J., 241, cp.
8 Law J., 241, cp.	262
Kinnear v. Tarrant, 15 East, 622	194
Kirby v. Ellison, 2 Dowl. 219	301
Kirby v. Simpson, 3 Dowl. 791 ..	11, 12
Kirk v. Clark, 4 Dowl. 363	105
Kirk v. Dolby, 6 Mees. & W. 638 ..	125
Kirk v. Nowell, 1 T. R. 260	63
Kirkham v. Marter, 2 B. & A. 613 ..	16
Kirkus v. Hodgson, 3 Taunt. 733 ..	239
Kirton v. Braithwaite, 1 Mees. & W.	810
810	76
Kitchen v. Brooks, 5 Mees. & W. 522.	319
Kitchen v. Croft, 12 Ad. & El. 586..	210
Kloss v. Dodd, 4 Dowl. 67	125
Knight v. Brown, 1 Dowl. 730	60
Knight v. Coleby, 5 Mees. & W. 274.	96
Knight v. Criddle, 9 East, 48	90
Knight v. M'Dowell et al., 12 Ad. & El.	438
438	132
Knight v. Woore, 3 Bing. N. C. 634.	58
Knowles v. Vallance, 1 Gale, 16	299
Kretschman v. Beyer, 1 T. R. 463....	194

L.

Lacey v. Forrester, 3 Dowl. 663	4
Lackington v. Atherton, 12 Law J.	143, cp.
143, cp.	283
Ladbroke v. Crickett, 2 T. R. 649 ..	93
Laidler v. Elliott, 3 B. & C. 738	225
Laidler v. Foster, 4 B. & C. 116	137
Laing v. Bowes, 3 M. & S. 89	73
Lake v. Smith, 1 B. & P. 174	149

	PAGE		PAGE
Lakin v. Massie, 4 Dowl. 239	301	Leith v. Pope, 2 W. Bl. 1827	
Lakin v. Watson, 2 Dowl. 638	118, 133	Leonard v. Baker, 1 M. & S. 251 ..	2
Lakin v. Watson, 2 Cr. & M. 685 ..	125	Leonard v. Simpson, 1 Hodg. 251 ..	200
Lambert v. Hutchinson, 2 Man. & Gr.		Lester v. Lazarus, 4 Dowl. 444	11
858	246	Levett v. Kibblewhite, 6 Taunt. 483.	118
Lambirth v. Barrington, 2 Bing.		Levett v. Perry, 5 T. R. 669	128
N. C. 149	30	Levi v. Duncombe, 1 Cr. M. & R. 737.	303
Lambirth v. Barrington, 4 Dowl. 126.	107	Levy r. Champneys, 2 Dowl. 454	104
Lamey v. Bishop, 1 Nev. & M. 332.	129	Levy r. Price, 2 Mees. & W. 533.	
Lane v. Bacchus, 2 T. R. 44	138		139, 141
Lane v. Crockett, 7 Price, 566	11	Lewin v. Edwards, 1 Dowl. N. C. 639.	28
Lang v. Webber, 1 Price, 375	111	Lewis v. Ashton, 1 Mees. & W. 493.	47
Langridge v. Levy, 7 Dowl. 27	145	Lewis v. Brown, 3 Dowl. 700	319
Langton v. Viney, 1 Mees. & W. 479.		Lewis v. Davison, 3 Dowl. 272	230
	284, 285	Lewis v. Eicke, 2 Dowl. 337	106
Lanyon v. Kelly, 8 Law J. 40, qb. ..	16	Lewis v. Gompertz, 6 Dowl. 124	291
Lardner v. Dick, 2 Cr. & M. 389 ..	59	Lewis v. Holding, 9 Dowl. 652	107
Larkin v. Massie, 4 Dowl. 239	198	Lewis v. Ikey, 2 Dowl. 222	100
Laroche v. Wasborough, 2 T. R. 737.		Lewis v. Morland, 2 B. & A. 56	310
	119, 225	Lewis v. Morris, 2 Cr. & M. 712	89
Lashmar v. Claringbold, 2 Har. &		Lewis v. Peate, 7 Taunt. 153	4
W. 87	105	Lewis v. Pine, 2 Dowl. 133	36, 37
Latimer v. Batson, 4 B. & C. 652 ..	93	Lewis, R. v., 2 T. R. 617	181
Laughter v. Laughter, 2 Crompt. & J.		Lewis v. Woolrych, 3 Dowl. 692.	
398, 1 Tyr. 352, 255, 256, 306, 307			60, 279, 285
Laughter v. Laughter, 1 Dowl. 284.		Licet v. Reid, Peake, 35	813
	306, 307	Lickbarrow v. Mason, 6 T. R. 131 ..	23
Lauman v. Ld. Audley, 2 Mees. &		Liffin v. Pitcher, 1 Dowl. N. C. 767 ..	299
W. 533	30	Line v. Low, 7 East, 330	222
Lav v. Newland, 1 Wils. 76	124	Linley v. Bates, 2 Tyr. 753	47
Laves v. Codrington, 1 Dowl. 30	84	Linthwaite v. Bellings, 2 Smith, 667 ..	45
Laves v. Scadding, 2 Dowl. N. C. 342 ..	290	Lisle v. Chetwood, 2 Tyr. 177	378
Lawrance, Exp., 2 Dowl. 230	304	Lister v. Mundell, 1 B. & P. 427 ..	7, 198
Lawrance v. Hodgson, 1 Young & J.		Little v. Heaton, 2 Ld. Raym. 750 ..	171
16	248, 286	Little v. Newton, 1 Man. & Gr. 976 ..	351
Lawson v. Case, 1 Cr. & M. 481	277	Little v. Newton, 2 Id. 351	261
Lawson v. Moggridge, 1 Taunt. 396.		Lock v. Vulliamy, 5 B. & Ad. 600 ..	344
	52, 56	Lockart v. Mackreth, 5 T. R. 663 ..	310
Layman v. Gowan, 10 Law J. 95, cp.	286	Lloyd v. Kent, 5 Dowl. 123, 2 Har. &	
Leach v. Thomas, 2 Mees. & W. 427.	22	W. 130	6
Leader v. Danvers, 1 B. & P. 350 ..	305	Lloyd v. Skutt, 1 Doug. 350	13
Leaf v. Jones, 3 Dowl. 315	201, 306	Lomas v. Mellor, 5 Moore, 95	10
Leander v. Davies, 1 B. & P. 359 ..	94	London, Bp. of, R. v., 1 D. & R. 486.	19
Ledwich v. Prangnell, 1 Moore, 292.	316	Loneragan v. Royal Exchange As-	
Lee v. Cass, 2 Taunt. 213	188	surance Comp., 7 Bing. 731, 736,	
Lee v. Gansell, Cowp. 3	284	1 Dowl. 223	7
Lee and Hemmingway, Re, 3 Nev. &		Longden v. Bourne, 1 B. & C. 278 ..	6
M. 860	253	Lonsdale, Earl, v. Whitney, 1 Cr. M.	
Lee v. Lingard, 1 East, 401	251	& R. 501	25
Lee v. Shore, 2 D. & R. 198	14	Lopez v. De Tastet, 8 Taunt. 712.	
Leeming v. Fearnley, 3 Nev. & M.			18, 19
232	264	Lopez v. De Tastet, 3 Brod. & B. 292.	
Leaning and Fearsby, Re, 5 B. & Ad.			72, 77
403	248	Lord v. Wardle, 3 Bing. N. C. 680 ..	2
Lees v. Kendal et al. 1 Har. & W.		Lord v. Wardle, 6 Dowl. 174	2
316	111	Losche v. Hague, 7 Dowl. 495	5
Lees v. Rogers, 4 Taunt. 150	53, 55	Love v. Honeybourne, 4 D. & R. 814.	26
Leeson v. Smith, 4 Nev. & M. 301 ..	5	Lovegrove v. Dymond, 4 Taunt. 609.	28
Leggett v. Finlay, 6 Bing. 255	245	Lovick v. Crowder, 8 B. & C. 132 ..	8
Legge v. Boyd, 3 Dowl. 272, 9 Law J.		Lovelace v. Curry, 7 T. R. 631	21
170, cp.	118	Lovelock v. Duncaster, 4 T. R. 123 ..	16
Legge v. Evans, 6 Mees. & W. 36 ..	92		

Table of Cases.

XXXV

	PAGE
<i>Il v. Curtis</i> , 5 Mees. & W. 158.	216
<i>v. Hierons</i> , 2 Moore. 102	12
<i>Robins</i> , 1 Brod. & B. 381	36
<i>Clarke</i> , 2 Chit. 240.	576
<i>s v. Lowndes</i> , 1 East, 276	258
<i>Wilson</i> , 2 Burr. 701	238, 257
<i>l v. Groombridge</i> , 2 Dowl.	
332, 12 Law J. 99, qb.	277
<i>Sutton</i> , 5 Dowl. 39	259
<i>v. Barrow</i> , 2 Dowl. 807	198

M.

<i>ne v. Coles</i> , 2 Dowl. 290	71
<i>rews v. Adams</i> , 3 Dowl. 120.	
270	295
<i>ur v. Campbell</i> , 5 B. & Ad.	
	247, 259
<i>ur v. Campbell</i> , 2 Nev. & M.	
	244, 259
<i>ur v. Campbell</i> , 4 Nev. & M.	
	257
<i>ey v. Titterton</i> , 10 Law J., 172,	
	215
<i>th v. Ellis</i> , 4 Bing. 578	7
<i>sfield</i> , Earl of, <i>v. Bradley</i> ,	
es. & W. 570, 10 Law J., 182,	
	19, 21
<i>am v. Carr</i> , 1 B. & P. 223.	
	52, 53, 56
<i>nac v. Melton</i> , 3 Nev. & M.	
	119
<i>gal v. Nicholls</i> , 6 Nev. & M.	
1 Har. & W. 462.	300
<i>gal v. Robertson</i> , 4 Bing. 455.	240
<i> Lovett</i> , 4 Burr. 2833	123
<i>am v. Smith</i> , 8 T. R. 86	308
<i>axle v. Martin</i> , 6 Taunt. 286.	273
<i>v. Smith</i> , 4 Taunt. 322.	119, 120
<i>v. Warren</i> , 5 Bing. 176	99
<i>stosh v. Blyth</i> , 1 Bing. 269	250
<i>ara v. Fisher</i> , 8 T. R. 302	185
<i>v. Hall</i> , 1 Burr. 11	13
<i>ck v. Hammett</i> , 7 T. R. 55, 122, 123	
<i>cks v. Phillips</i> , 5 Nev. & M.	
1 Har. & W. 251	198, 361
<i>n v. White</i> , 2 T. R. 159	148
<i>v. Bacon</i> , 5 Bing. N. C. 246, 71, 74	
<i>v. Godwin</i> , 1 Nev. & M. 101.	240
<i> R. v.</i> , 1 Dowl. 538.	253
<i>v. Ellis</i> , Bul. N. P. 198.	205
<i>v. Yorston</i> , 6 Dowl. 481	252
<i>v. Glilks</i> , 7 Taunt. 467	209
<i>v. Frazer</i> , 1 Cr. & M. 325.	18
<i>id v. Mazaredo</i> , 6 M. & S. 189.	225
<i>v. Oxenham</i> , 5 Taunt. 340	180
<i>m v. Fullarton</i> , 2 T. R. 645.	
	235, 265
<i> R. v.</i> , 4 Burr. 2135	1
<i>v. Stackley</i> , 2 Dowl. N. C.	
12 Law J., 92, cp.	268, 270

	PAGE
<i>Manchester & Leeds Railway, Co.</i> ,	
<i>R. v.</i> , 8 Ad. & El. 413	287
<i>Mann v. Calow</i> , 1 Taunt. 221	116
<i>Manners v. Postan</i> , 3 B. & P. 343	193
<i>Manning v. Underwood</i> , 1 M'Lel.	
& Y.	206
<i>Manser v. Heaver</i> , 3 B. & Ad. 295.	
	290, 261, 269
<i>Mansfield v. Breary</i> , 3 Nev. & M. 471.	
	52, 55
<i>Mantell v. Southall</i> , 2 Bing. N. C. 74.	50
<i>Mara v. Quin</i> , 6 T. R. 1.	30, 36
<i>Marder v. Cox</i> , Cowp. 127	248
<i>Margreem v. Mickelwaine</i> , 2 New	
Rep. 509.	317
<i>Marnell v. Pickmore</i> , 2 Esp. 473.	
	205, 206
<i>Marr v. Smith</i> , 4 B. & A. 466	113
<i>Marriott v. Stanley</i> , 1 Man. & Gr. 858.	42
<i>Marsh v. Bower</i> , 2 W. Bl. 851.	12
<i>Marsh v. Fawcett</i> , 2 H. Bl. 582.	196
<i>Marshall v. Parsons</i> , 9 Dowl. 251	72
<i>Marshall</i> , Re, 12 Law J., 104, qb.	299
<i>Marshall v. Wilder</i> , 9 B. & C. 655	200
<i>Marston v. Halls</i> , 5 T. R. 292	138
<i>Murston v. Halls</i> , 2 Mees. & W. 60.	
	138, 225
<i>Martin v. Burge</i> , 6 Nev. & M. 301.	266
<i>Martin v. Colvill</i> , 2 Dowl. 694.	290
<i>Martin v. Justice</i> , 8 T. R. 699	142
<i>Martin v. O'Hara</i> , Cowp. 823	193
<i>Martin v. Thornton</i> , 4 Esp. 180	296
<i>Martindale v. Booth</i> , 9 B. & Ad. 498.	98
<i>Martins v. Upcher</i> , 1 Dowl. N. C. 555.	213
<i>Mash v. Densham</i> , 1 Mood. & Rob.	
442	180
<i>Mason v. Clarke</i> , 1 Dowl. 288	16
<i>Mason v. Redshaw</i> , 2 Dowl. 595	107
<i>Mason v. Vickery</i> , 1 Smith. 304	9
<i>Mason v. Wallis</i> , 10 B. & C. 107.	244
<i>Mason v. Whitehouse</i> , 4 Bing. N. C.	
692	306
<i>Massey v. Johnson</i> , 12 East, 67	212
<i>Masterman v. Grant</i> , 5 T. R. 714	189
<i>Masterman v. Judson</i> , 8 Bing. 224.	129
<i>Masterman v. Mallin</i> , 7 Bing. 435	119
<i>Masters v. Stanley</i> , 8 Dowl. 169,	
9 Law J., 145, ex.	91
<i>Masters v. Tickler</i> , 2 Har. & W. 81.	75
<i>Matchett v. Parkes</i> , 11 Law J., 287, ex. 68, 69	
<i>Matthews v. Sims</i> , 5 Dowl. 334	107
<i>Matthews v. Swift</i> , 1 Bing. N. C. 735.	123
<i>Mattravers v. Fossit</i> , 3 Wils. 295.	116
<i>Maughan v. Walker</i> , 5 T. R. 98	188
<i>May v. Selby</i> , 11 Law J., 223, cp.	
1 Dowl. N. C. 708	73
<i>Mayhew v. Locke</i> , 7 Taunt. 63	218
<i>Meale v. Goddard</i> , 5 B. & A. 768.	20
<i>Mears v. Griffin</i> , 1 Man. & Gr. 796.	5
<i>Melhuish v. Maunder</i> , 2 New Rep. 72.	197
<i>Melin v. Taylor</i> , 2 Hodg. 3	1
<i>Mellin v. Taylor</i> , 3 Bing. N. C. 109.	3

	PAGE		PAGE
Mendell v. Tyrrell, 9 Mees. & W. 217.	253, 258	Morgan v. Johnson, 1 H. Bl. 628....	311
Meredith v. Drew, 1 Dowl. 252....	54, 55	Morgan v. Lute, 1 Chit. 381.....	18
Messenger v. Armstrong, 1 T. R. 54.	149	Morgan v. Morgan, 1 Dowl. 611....	308
Mestaer v. Hertz, 3 M. & S. 450. 123,	133	Morgan v. Palmer, 2 B. & C. 739....	311
Metcalf v. Scholey, 2 New Rep. 461.	91	Morgan v. Smith, 1 Dowl. N. C. 617.	341
Metcalf et ux. v. Boote, 6 D. & R. 46.	202	Morgan v. Stone, 1 Gale, 15.....	378
Meyer v. Ring, 1 H. Bl. 541.....	120	Morgan v. Thorne, 7 Mees. & W. 401.	41
Middlesex, Sheriff of, R. v., 5 B. & C.	389	Morgan v. Williams, 2 Dowl. 123....	251
Middlesex, Sheriff of, R. v., 1 Chit. 732.	275	Morland v. Chitty, 1 Dowl. 520.....	106
Middlesex, Sheriff of, R. v., 2 Dowl. 5.	321, 322	Morley v. Newman, 5 D. & R. 317....	264
Middlesex, Sheriff of, R. v., 4 Dowl.	785	Morris v. Bedward, 9 Dowl. 130....	312
Middlesex, Sheriff of, R. v., 2 Mees.	& W. 107	Morris v. Hunt, 1 Chit. 97.....	278
Middlesex, Sheriff of, R. v., 7 T. R. 439,	527	Morris v. Hunt, 2 B. & A. 355.....	236
Middleton v. Chambers, 1 Mann. &	Gr. 97	Morris v. Hunt, 1 Chit. 544.....	66
Middleton, R. v., Fost. 201.....	304	Morris v. Jones, 2 B. & C. 232.....	97
Milborn v. Copeland, 1 M. & S. 104.	143	Morris v. King, 9 Law J., 320, qb....	34
Millard v. Milman, 2 Dowl. 523. 222,	233	Morris v. Magrath, 3 Brod. & B. 301.	328
Miller v. Newbald, 1 East, 662.....	138	Morris v. Parkinson, 3 Dowl. 744....	68
Miller v. Parnell, 6 Taunt. 370.....	83	Morris v. Vivian, 11 Law J., 367, ex.	1
Miller v. Thompson, 11 Law J., 224,	cp.	Morrison, Re, 8 Dowl. 94.....	235
Miller v. Williams, 5 Esp. 19.....	53	Morrison v. Salmon, 9 Dowl. 387, 10	43
Milligan v. Thomas, 4 Dowl. 373.....	10	Law J., 91, cp.....	34
Mills v. Furnell, 4 D. & R. 561.....	38	Mortimer v. Piggott, 2 Dowl. 615....	234
Mills v. Stephens, 3 Mees. & W. 460.	41	Morton v. Burn, 5 Dowl. 421.....	19
Milne v. Gratrix, 7 East, 608.....	239	Moses v. Richardson, 8 B. & C. 421.	308
Milner v. Graham, 2 Dowl. 422.....	58	Moss v. Birch, 5 T. R. 722.....	314
Milstead v. Coppard, 5 T. R. 273.....	84	Motteux v. St. Aubin, 2 W. Bl. 1138.	307
Milstead v. Craufield, 9 Dowl. 124....	238	Moule v. Stawell, 15 East, 99 n.....	254
Milton v. Green, 5 East, 233.....	215	Mount v. Larkins, 1 Dowl. 262.....	71
Minchia v. Clement, 1 B. & A. 252. 13,	14	Mountcharles, Ld. v. York, 1 Ld.	Ken. 341.....
Minns v. Baxter, 1 T. R. 16.....	295	Mudie v. Newman, 2 Dowl. 630....	298
Minshall v. Soane, 8 Law J., 44, ex.	209	Muller v. Hartshorne, 3 B. & P. 556.	71
Minster v. Coles, 2 Chit. 237.....	310	Mullins v. Scott, 5 Bing. N. C. 423.	58, 55
Mitchel v. Oldfield, 4 T. R. 123.....	110	Mummery v. Campbell, 2 Dowl. 798.	71
Mitchel v. Wheeler, 2 H. Bl. 30.....	130	Munkenbeck v. Bushell, 4 Dowl. 139.	12
Moggeridge v. Drew, 9 Dowl. 1042....	16	Muppin v. Gillatt, 4 Dowl. 190.....	11
Molyneux v. Brown, 2 Dowl. 84.....	230	Murphy v. Marlow, 1 Camp. 37.....	12
Moody v. Aslatt, 3 Dowl. 430.....	117	Muspratt v. Dixon, M.S. East, 1819.	22
Moody v. Aslatt, 1 Cr. M. & R. 771.	125	Musselbrooke v. Dunkin, 9 Bing. 605.	24
Moody v. Dick, 4 Nev. & M. 348....	9	Musselbrooke v. Dunkin, 1 Dowl. 722.	251
Moody v. Stracey, 4 Taunt. 588.....	133	Mutchinson v. Allcock, 1 D. & R.	165.....
Moon v. Raphael, 1 Hodg. 289.....	194	Myers v. Cooper, 2 Dowl. 423.....	22
Moore v. Adam, 5 M. & S. 156.....	71, 72	Myers v. Wills, 4 Moore, 147.....	30
Moore v. Bowmaker, 6 Taunt. 379....	182		
Moore v. Butlin, 7 Ad. & El. 595. 259,	263	Nadin v. Battie, 5 East, 147.....	10
Moore v. Clay, 4 Dowl. 5.....	209	Nanny v. Kenrick, 2 Dowl. 334....	5
Moore v. Jones, 2 Dowl. 58.....	52, 55	Napier v. Daniel, 3 Bing. N. C. 77..	1
Moore v. Lynch, 1 Wils. 213.....	141	Nash v. Swinburne, 1 Dowl. N. C. 190.	1
Moore v. Stockwell, 6 B. & C. 76.....	317	Nathan v. Cohen, 1 Har. & W. 107,	3 Dowl. 370.....
Moreau v. Hicks, 4 Nev. & M. 563,	1 Har. & W. 87.....	Naylor's bail, 3 Dowl. 452.....	11
Morgan v. Burgess, 1 Dowl. N. C. 850.	34	Neal v. Postlethwaite, 1 Ad. & El.	N. C. 243.....
Morgan v. Eastwick, 7 Dowl. 543.....	216	Needham v. Bristow, 1 Dowl. N. C.	700.....
Morgan v. Edwards, 6 Taunt. 398....	62	Neeson v. Whytock, 3 Taunt. 403....	27

Table of Cases.

[illegible]

	PAGE		PAGE
Peacock v. Jeffery, 1 Taunt. 426.	109, 112	Pierson v. Goodwin, 1 B. & P. 36	
Peacock v. Purvis, 2 Brod. & B. 362.	96	Piggott v. Kemp, 2 Dowl. 20	...
Pearce v. Cameron, 1 M. & S. 675.	118	Pike v. Davis, 6 Mees. & W. 546	
Pearman v. Carter, 2 Chit. 29	236	Pike, Exp., 1 Dowl. N. C. 275	..
Pearse v. Cameron, 1 M. & S. 675.	252	Pilcher v. Woods, 4 Dowl. 329	...
Pearson v. Archbold, 12 Law J., 230,		Pilford's case, 10 Co. 115	.....
ex.	257	Pincher v. Brown, 3 Moore, 590	
Pearson, R. v., 2 Burr. 1039	216	Pippett v. Hearn, 1 D. & R. 266	
Pearson v. Bawlings, 1 East, 77	230	Pitcher v. Roberts, 12 Law J., 178,	
Peckham, R. v., 2 W. Bl. 1218	309	Pitt v. Coombs, 1 Har. & W.	
Pedley v. Goddard, 7 T. R. 73.	256, 269	4 Nev. & M. 535	.....
Pedley v. Westmacott, 3 East, 603	238	Pitt v. Coombs, 3 Nev. & M. 212	
Pellatt v. Roll, 2 W. Bl. 900	44	Pitt v. Evans, 3 Dowl. 649	....
Penny v. Slade, 5 Bing. N. C. 469	214	Pitt v. Evans, 2 Dowl. 226	.....
Penrose v. Johns, 2 Nev. & M. 376.	13	Pitt, Exp., 2 Dowl. 439	.....
Pepper v. Gorham, 4 Moore, 148	261	Pitt v. Williams, 4 Dowl. 70	....
Perkins v. Burton, 2 Dowl. 108	106	Platt v. Greene, 3 Dowl. 216	....
Perkins v. Pettit, 2 B. & P. 275	116	Pleasant v. Benson, 14 East, 234,	
Perkins v. Pettit, 2 B. & P. 440	140	Plevin v. Henshall, 2 Dowl. 743.	
Perkins v. Vaughan, 1 Dowl. N. C. 700.	16	Pleydell v. Ld. Dorchester, 7 T.	
Perkins v. Woolaston, 1 Salk. 321	137	529	.....
Perreau v. Bevan, 5 B. & C. 284.	181, 182	Plock v. Pachico, 9 Mees. & W.	
Perrin v. Kymmer, 1 Har. & W. 20	286	Pocock v. Cockerton, 8 Law J., 3	
Perrin v. West, 1 Har. & W. 401,		Pocock v. Cockerton, 7 Dowl. 21.	
5 Nev. & M. 291	273	Pocock v. O'Shaunessy, 6 Ad. &	
Perring v. Kepner, 4 Nev. & M. 477.	283	807	.....
Perring and Keymer, Re, 3 Dowl. 98.	258	Poole v. Charnock, 3 T. R. 79	..
Perry v. Campbell, 3 T. R. 390	138	Poole v. Pembrey, 1 Dowl. 663	..
Perry v. Fisher, 6 East, 549	317	Pope v. Banyard, 3 Mees. & W. 881	
Perryman v. Steggall, 2 Dowl. 726.	263	Pope v. Mann, 2 Mees. & W. 881	
Perse v. Browning, 1 Mees. & W. 362.	272	Porkers v. Wilkins, 7 Dowl. 152	
Peter House, Cambridge, R. v., 1 Ad.		Porlain v. Panley, 1 W. Bl. 670	
& El. 814	286	Porter v. Cooper, 2 Cr. M. & R.	
Petre v. Croft, 4 East, 453	122, 123	Porter v. Philpot, 14 East, 344	..
Petrie v. Hannay, 3 T. R. 650	120	Porter v. Pittman, 2 D. & R. 266	
Pewtre v. Annan, 9 Dowl. 828	92	Postan v. Massaer, 2 Cr. & M. 6	
Philby v. Ikey, 2 Dowl. 222	106	Potter v. Newman, 2 Cr. M. & R.	
Phillips v. Birch, 11 Law J., 297, cp.	86	Potter v. Newman, 4 Dowl. 504.	
Phillips v. Birch, 2 Dowl. N. C. 97	300	Potts v. Ward, 1 Marsh. 366	...
Phillipson v. Caldwell, 6 Taunt. 176	110	Powell v. Lock, 4 Nev. & M. 85	
Phillips, — v., 1 Cr. & M. 26	13	Powder v. Jones, 1 Str. 445	.....
Phillips v. Berkley, 5 Dowl. 279	196	Powis v. Powis, 6 Moore, 517	..
Phillips v. Drake, 2 Dowl. 45	281	Poyner v. Hatton, 7 Mees. & W.	
Phillips v. Hatfield, 10 Law J., 33, ex.	18	Pratt v. Delarue, 12 Law J., 25	
Phillips v. Hutchinson, 3 Dowl. 20	27	Preedy v. Lovell, 4 Dowl. 671	..
Phillips v. Hutchinson, 3 Dowl. 583	305	Preedy v. Macfarlane, 1 Cr. M. &	
Phillips v. Morgan, 4 B. & A. 653	95	819	.....
Phillips v. Price, 3 M. & S. 180	182	Prentice v. Read, 1 Taunt. 151	..
Phillips v. Turner, 6 Bing. 237	120	Prestige v. Woodman, 1 B. & C.	
Phillips v. Weyman, 2 Chit. 265	297	Preston v. Eastwood, 7 T. R. 95.	
Philpot v. Page, 4 B. & C. 160	17	Price v. Duggan, 1 Dowl. N. C.	
Phippes v. Ingram, 3 Dowl. 669.	240, 261	Price v. Harris, 2 Dowl. 804	....
Phytian v. White et al., 1 Mees. &		Price v. Hayman, 4 Mees. & W.	
W. 216	60	Price v. Helyer, 4 Bing. 597	....
Pickardo v. Machado, 4 B. & C. 886.	280	Price v. Hollis, 1 M. & S. 105	..
Pickering v. Dowson, 4 Taunt. 779	7	Price v. James, 2 Dowl. 435	....
Pickford v. Ewington, 4 Dowl. 453,		Price v. Messenger, 2 B. & P. 11	
1 Gale, 357	286	Price v. Morgan, 2 Mees. & W.	
Pickles, R. v., 12 Law J. 40, qb	287	Price v. Parkin, 10 Ad. & El. 1	
Pickman v. Robson, 1 B. & A. 486.	35, 36	Price v. Philcox, 7 Dowl. 559	..
Pickup v. Wharton, 2 Dowl. 388	197	Price v. Price, 9 Dowl. 834	.....
Pickwood v. Wright, 1 H. Bl. 642.	38, 127	Price, R. v., 2 Cr. & M. 212	..

Table of Cases.

xxxix

	PAGE		PAGE
Price, R. v., 2 Dowl. 233	303	Read v. Cooper, 5 Taunt. 89	292
Price v. Trenchard, 1 Dowl. N. C. 296 ..	15	Read v. Dutton, 2 Mees. & W. 69 ..	245
Price v. Varney, 3 B. & C. 733	99	Read v. Fore, 1 Chit. 170	254
Primrose v. Baddeley, 2 Cr. & M. 468 ..	93	Read v. Lee, 2 B. & Ad. 416	301
	233, 230	Read v. Massie, 4 Dowl. 681	276, 286
Primrose v. Gibson, 2 D. & R. 193 ..	83	Read v. Speer, 5 Dowl. 330	294
Prince v. Nicholson, 5 Taunt. 338 ..	276	Redford v. Edie, 6 Taunt. 240	299
Prince v. Nicholson, 6 Taunt. 45 ..	121	Redford v. Garrod, 7 Taunt. 537	139
Prince v. Sarno, 4 Dowl. 5	70	Redshaw v. Brook, 2 Wils. 405	4
Pringle v. Isaac, 11 Price, 445	89	Reece v. Lee, 7 Moore, 299	136
Pringle v. Marsack, 1 D. & R. 155 ..	279	Reech v. Hall, 1 Doug. 21	149
Prior v. Duke of Buckingham, 8 Moor. 584	116	Reed v. Cooper, 5 Taunt. 320	116
Prior v. Hembrow et al., 8 Mees. & W. 873	240	Reed v. Thoyts, 6 Mees. & W. 410 ..	95
Probert v. Phillips et al., 2 Mees. & W. 40	58	Reeder v. Bloom, 2 Bing. 333	124
Probin v. Locock, 1 Dowl. N. C. 197 ..	290	Rees v. Morgan, 3 T. R. 349	121
Proctor v. Nicholson, 7 Car. & P. 67 ..	92	Reeves v. Crisp, 6 M. & S. 274	274
Prosser v. Goring, 3 Taunt. 426	263	Reeves v. M'Gregor, 9 Ad. & El. 576 ..	265
Pryme v. Brown, 1 Dowl. N. C. 680 ..	434	Reeves v. Stroud, 1 Dowl. 399	56
Pugh v. Kerr, 9 Law J., 255, ex., 8 Dowl. 218	70	Reid v. Cooper, 5 Taunt. 320	141
Pugh v. Kerr, 5 Mees. & W. 104 ..	296	Reid v. Deer, 7 D. & R. 612	305
Pullen v. Seymour, 5 Dowl. 164, 129, 134	184	Reid v. Fryatt, 1 M. & S. 1	245
Purden v. Brockbridge, 2 B. & C. 342 ..	227	Rendall v. Hayward, 5 Bing. N. C. 424 ..	5
Purnell v. Young, 3 Mees. & W. 288 ..	41	Rennie v. Mills, 8 Law J., 148, cp. ...	82
Putland v. Newman, 6 M. & S. 179 ..	34	Rennie v. Yarston, 8 Dowl. 320	51
Pyne v. Erie, 8 T. R. 407	234	Rese v. Fenn, 2 Dowl. 182	303
		Reynolds v. Edwards, 6 T. R. 11	44
		Reynolds v. Matthews, 7 Dowl. 580 ..	48
		Reynolds v. Stone, 1 Dowl. N. C. 578 ..	16
		Reynolds v. Tolman, 11 Law J., 94, qb.	54
		Rhodes v. Haigh, 3 D. & R. 608, 2 B. & C. 345	240
		Ribit v. Wheeler, Bay. 166	139
		Rice v. Brown, 1 B. & P. 30	216
		Rice v. Leigh, 2 Dowl. 105	56
		Richards v. Acton, 2 W. Bl. 1220 ..	181
		Richards v. Cohen, 1 Dowl. 533	59
		Richards v. Frankum, 9 Law J., 231, ex.	83
		Richards v. Isaac, 1 Cr. M. & R. 136 ..	273
		Richardson v. Fisher, 1 Bing. 145 ..	7
		Richardson v. Mellish, 3 Bing. 334, 7 B. & C. 819	126, 133
		Richardson v. Nourse, 3 B. & A. 237 ..	263
		Richer, Exp., 4 Dowl. 276, 1 Har. & W. 518	209
		Richmond v. Bowditch, 1 Mees. & W. 40	308
		Richmond v. Parkinson, 3 Dowl. 708 ..	254
		Richards v. Patteson, 7 Mees. & W. 313	312
		Ricketts v. Burman, 4 Dowl. 578 ..	14, 15
		Riddell v. Nash, 8 Moore, 682	280
		Rider et al., Re, 3 Bing. N. C. 874 ..	266
		Ridgway v. Baynton, 2 Dowl. 183 ..	290
		Ridgway v. Fisher, 3 Dowl. 567	105
		Ridley v. Goddard, 7 T. R. 73	258
		Ridout v. Pye, 1 B. & P. 91	243, 292
		Rigby v. Okell, 7 B. & C. 67	19, 248
		Right v. Darby, 1 T. R. 162	149
		Right v. Wrong, 2 D. & R. 84	150
		Right d. Freeman v. Roe, 2 Chit. 180 ..	158
Q.			
Quick v. Staines, 1 B. & P. 303	92		
Quilters v. Needy, 9 Dowl. 139	320		
Quin v. King, 4 Dowl. 736	292		
Quin v. Reynolds, 3 M. & S. 144	290		
R.			
Radcliffe v. Hall, 3 Dowl. 803	70		
Ragg v. Wells, 8 Taunt. 129	199		
Rand v. Vaughan, 1 Hodg. 173	33		
Randall v. Randall, 7 East, 81	265		
Randall v. Sweet, 10 Law J., 183, cp. 210			
Randole v. Bailey, 1 M. & S. 232 ..	119		
Rankin v. Marsh, 8 T. R. 30	122		
Ransford v. Barry, 7 Dowl. 807	103		
Rastall v. Stratton, 1 H. Bl. 49	128		
Ratcliffe v. Hall, 1 Gale, 140	59		
Ratcliffe v. Hall, 2 Cr. M. & R. 258 ..	249		
Rathbone v. Fowler, 3 Mees. & W. 137	208		
Rawes v. Knight, 1 Bing. 132	318		
Rawlins v. Till, 3 Mees. & W. 28 ..	41		
Rawthorne v. Arnold, 6 B. & C. 629 ..	259, 260		
Rawston v. Esteridge, 2 Chit. 273 ..	12		
Rawtree v. King, 5 Moor, 167	122, 236		
Raynes v. Jones, 11 Law J., 62, ex. 92			
Raynes v. Jones, 9 Mees. & W. 104 ..	212		

Table of Cases.

xli

	PAGE		PAGE
Baunderson v. Brown, 7 Ad. & El.	37	Sherry v. Oakes, 1 Har. & W.	119.
261, 7 Law J., 29, qb.....	207	3 Dowl. 349.....	200
Baunderson v. Marr, 1 H. Bl. 75....	207	Sherwood v. Taylor, 6 Bing. 280..	46, 51
Bavage v. Ashwin, 8 Law J., 43 ex.	263	Shillito v. Theed, 6 Bing. 753.....	4
Bavage v. Ashwin, 4 Mees. & W. 530.	270	Shillito v. Claridge, 2 Chit. 423....	20
Bavage v. Lipscombe, 5 Dowl. 385....	75	Shimel v. Lousada, 4 Taunt. 695....	71
Baville v. Jardine, 2 H. Bl. 531.....	39	Shipman v. Stevens, 2 Wils. 59.....	206
Bavory v. Chapman, 11 Ad. & El. 829.	234	Shirley v. Jacobs, 3 Dowl. 101.....	117,
Bawle v. Paynter, 1 D. & R. 307....	89		285, 303
Bawyer v. Thompson, 9 Mees. & W.		Shiver v. Walker, 2 Man. & Gr. 917.	277
248.....	294	Short v. Hubbard, 2 Bing. 350.....	181
Bayer v. Pocock, Cowp. 407.....	124	Short v. Smith, 1 Man. & Gr. 211..	305
Scales v. East London Water Works		Short v. Williams, 4 Dowl. 357.....	209
Company, 1 Hodg. 91. 244.....	270	Shotwell v. Barlow, 3 Dowl. 709....	50
Scales v. Sargeson, 3 Dowl. 707.....	108	Shrimpton v. Carter, 3 Dowl. 648..	276
Scales v. Sargeson, 4 Dowl. 231.....	108	Shrubb v. Barrett, 2 H. Bl. 28.....	62
Schletter v. Cohen, 7 Mees. & W. 389.	270	Shugars v. Concannon, 7 Dowl. 391.	329
Schoole v. Noble, 1 H. Bl. 23.....	111	Shuttleworth v. Clarke, 4 Dowl. 561.	106
Scott v. Bye, 2 Bing. 344.....	56, 135	Shuttleworth v. Cocker, 1 Man. & Gr.	
Scott v. Cogger, 3 Dowl. 212.....	319	829.....	42
Scott v. Scholey, 8 East, 467.....	91	Siboni v. Kirkman, 3 Mees. & W. 46.	124
Scott v. Van Sandau, 1 Ad. & El.		Siggers v. Brett, 5 B. & Ad. 455....	231
N. C. 102.....	240	Siggers v. Sanson, 2 Dowl. 745.....	114, 126
Scott v. Walthman, 3 Stark. 168.....	181	Silverides v. Bowley, 1 Moore. 92..	46
Scott v. Whalley, 1 H. Bl. 297.....	34	Simes v. Gibbs, 6 Dowl. 810.....	276
Scott v. Williams, 3 Dowl. 508.....	252	Simmonds v. Swaine, 1 Taunt. 549..	266
Seagull v. Campbell, 1 Chit. 283....	127	Simon v. Gurney, 5 Taunt. 605.....	120
Scruton v. Taylor, 8 Dowl. 110.....	41	Simpson v. Clayton, 2 Bing. N. C.	
Seal v. Phillips, 3 Price, 17.....	182	467.....	13
Sealy v. Powis, 1 Har. & W. 2.....	5	Simpson v. Drummond, 2 Dowl. 478.	277
Sealy v. Robertson, 2 Dowl. 538....	290	Simpson v. Hadley, 1 M. & S. 690.	
Seal v. Johnson, 1 Dowl. 384.....	226		109, 110
Seaton v. Heap, 5 Dowl. 247.....	35	Simpson v. Hanley, Id. 696.....	112
Seaward v. Williams, 1 Dowl. 528....	107	Simpson v. Heath, 9 Law J., 129, ex.	34
Sealey v. Mayhew, 4 Bing. 561.....	8	Simpson v. Heath, 5 Mees. & W. 681.	88
Seal v. Carter, 2 Dowl. 245.....	259	Simpson v. Hurdie, 3 Mees. & W. 84.	40
Sellman v. Boorn, 8 Mees. & W. 552.	82	Sims v. Jaquest, 2 Dowl. 800.....	48
Sells v. Hoare, 3 Brod. & B. 232....	7	Singleton v. Johnson, 9 Mees. & W.	
Selles, Lord, v. Powell, 6 Taunt. 207.	12	67.....	274
Sample v. Turner, 6 Mees. & W. 152.	139	Skeete et al., Re, 7 Dowl. 618.....	253
Savern v. Olive, 3 Brod. & B. 72....	73	Skelton v. Steward, 1 Dowl. 411....	72
Saxon v. Astrop, 1 Dowl. N. C. 14,		Skinner v. Davies, 2 Taunt. 196.....	55
33, 11 Law J., 89, ex.....	147	Skinner v. Shoppee et ux., 9 Law J.,	
Shaddick v. Bennett, 4 B. & C. 769.		90, cp.....	50
	53, 55	Skipper v. Lane, 2 Dowl. 784.....	103
Sharman v. Bell, 5 M. & S. 504.....	263	Skirrow v. Tagg, 5 M. & S. 281....	68
Sharp v. Johnson, 2 Bing. N. C. 246,		Skutt v. Woodward, 1 H. Bl. 238..	123
4 Dowl. 324.....	277, 280, 283	Slater v. Lawson, 1 B. & Ad. 893..	198
Sharp v. Key, 8 Mees. & W. 379....	98	Slater v. Yates, 2 Mees. & W. 67..	207
Sharpe v. Brice, 2 W. Bl. 942.....	4	Sloman v. Back, 3 B. & Ad. 103....	104
Shaw v. Mansfield, 7 Price, 709.....	293	Sloman v. Gregory, 1 D. & R. 181..	317
Shaw v. Masters, 2 Taunt. 174.....	290	Sly v. Stevenson, 2 Car. & P. 464..	215
Shaw v. Maxwell, 6 T. R. 450.....	84, 120	Smales v. Wright, 3 M. & S. 559..	242
Shaw v. Oates, 4 Dowl. 720.....	54	Smith v. Blake, 8 Dowl. 130.....	
Shaw v. Perkin, 1 Dowl. N. C. 306.	281		254, 256, 258
Sheldon v. Mumford, 5 Taunt. 268..	188	Smith v. Brandram, 2 Man. & Gr. 244.	
Shepherd v. Halla, 2 Dowl. 453.....	33		130, 131
Shepherd v. Thompson, 1 Dowl. N.		Smith v. Campbell, 6 Bing. 637.....	58
C. 345.....	9	Smith v. Campbell, 6 Dowl. 728....	290
Shepherd v. Thompson, 9 Mees. & W.		Smith v. Cave, 3 Lev. 812.....	139
110.....	194	Smith v. Clark, 9 Dowl. 202.....	151
Sherlock v. Barned, 8 Bing. 21.....	20	Smith v. Clarke, 2 Dowl. 218.....	319, 321

	PAGE		PAGE
Smith v. Collier, 3 Dowl. 100.....	292	Spirley v. Newman, 2 Esp. 266.....	1
Smith v. Dixon, 1 Har. & W. 668...	124	Sprivy v. Webster, 2 Dowl. 46... 198,	
Smith v. Edwards, 4 Dowl. 621.....	40		249, 2
Smith, Exp., 2 Dowl. 607.....	281	Sprivy v. Webster, 1 Dowl. 696.....	3
Smith v. Festiniog Railway Co., 4		Spong v. Hogg, 2 W. Bl. 802.....	
Bing. N. C. 23.....	263	Spooner v. Danks, 7 Bing. 772, 1 Dowl.	
Smith v. Fielder, 2 Dowl. 764.....	251	332.....	1
Smith v. Hirst, MS. T. 1821.....	194	Spooner v. Garland, 2 M. & S. 474..	1
Smith v. Howard, 2 D. & R. 85.....	138	332.....	238, 2
Smith v. Hurrell, 10 B. & C. 542....	56	Spragg v. Willis, 2 Dowl. 531, 2 Nev.	
Smith v. Jeffreys, 6 T. R. 776.....	225	& M. 678.....	238, 2
Smith v. Johnson, 2 Cr. M. & R. 350.	83	Sprague v. Mitchell, 2 Chit. 271....	
Smith v. Johnson, 15 East, 213.....	257	Sprigens v. Nash, 5 M. & S. 193....	2
Smith v. Knowelden, 9 Dowl. 402, 10		Sprigge v. Ruthford, 2 Dowl. 429.	1
Law J., 126, cp.....	130	Stafford, Sh. of, E. v., 5 Dowl. 238..	2
Smith v. Muller, 3 T. R. 624.....	235	Stainland v. Ogle, 3 Dowl. 99.....	2
Smith v. Preston, 2 Har. & W. 98...	208	Staley v. Bedwell, 10 Ad. & El. 145.	1
Smith v. Russell, 3 Taunt. 400.....	95	Staley v. Long, 3 Bing. N. C. 781....	1
Smith v. Sandys, 1 Har. & W. 377,		Stander v. Hall, 1 Ld. Ken. 338....	1
5 Nev. & M. 59.....	227, 234,	Standley v. Hemington, 6 Taunt. 551.	2
	314	Stanford, Re, 1 Dowl. N. C. 185....	2
Smith v. Shepherd, 5 T. R. 9.....	286	Stanland v. Ludlam, 4 B. & C. 889..	
Smith v. Smith, 3 Dowl. 733.....	45		65 191
Smith v. Spurr, 2 Dowl. 231.....	289	Stansbury v. Matthews, 4 Mees. & W.	
Smith v. Sterling, 3 Dowl. 609.....	232	343.....	13
Smith v. Webb, 2 Mees. & W. 879...	319	Stansbury v. Matthews, 7 Dowl. 23... 13	
Smith v. Wiltshire, 5 Moore, 322....	215	Starling v. Cousins, 3 Dowl. 782....	11
Smith v. Younger, 3 B. & P. 550....	277	Starling v. Cozens et al., 2 Cr. M. &	
Smithies, R. v., 3 T. R. 351.....	305	R. 445.....	1
Snook v. Hellyer, 2 Chit. 43.....	241	Stead v. Salt, 3 Bing. 101.....	2
Snook v. Mattock, 5 Ad. & El. 239.	138	Stears v. Smith, 6 Esp. 138.....	2
Solileux v. Herbst, 2 B. & P. 444...	238	Steel v. Allen, 2 B. & P. 362.....	2
Solomons v. Jenkins, 2 Chit. 23.....	123	Steel v. Brown, 1 Taunt. 381.....	1
Solomons v. Lyon, 1 East, 309.....	125	Steel v. Sowerby, 6 T. R. 171.....	1
Somerville v. White, 5 East, 145....	137	Steeple v. Bonsall, 2 Har. & W. 11.	
Sothee v. Terry, 2 Dowl. 522.....	70		33, 2
Soulsby v. Hodgson, 3 Burr. 1474...	242	Stephens v. Derry, 16 East, 147....	1
Southcote v. Braithwaite, 1 T. R. 624.	140	Stephens v. Pell, 2 Dowl. 629.....	1
Southgate et al. v. Crowley, 1 Bing.		Stevens v. Pell, 2 Cr. & M. 431.....	3
N. C. 518.....	198	Stevenson v. Danvers, 2 B. & P. 109.	1
Southwell v. Bird, 7 Dowl. 557.....	75	Stevenson v. Grant, 2 New Rep. 103.	1
Sowerby v. Woodroff, 1 B. & A. 567.	275	Steward v. Lombe, 4 Moore, 281, 1	
Sowley v. Jones, 2 W. Bl. 75.....	193	Brod. & B. 506.....	1
Spain v. Cadell, 10 Law J., 313 ex., 9		Steward v. Williamson, 5 Bing. 415.	2
Dowl. 745.....	48, 237,	Stewart v. Lombe, 1 Brod. & B. 506.	1
	249	Steyner v. Cottrell, 3 Taunt. 377....	2
Sparkes v. Bell, 8 B. & C. 1.....	203	Stockdale v. Hansard, 11 Ad. & El. 253.	1
Sparrow v. Lewes, 8 Taunt. 126....	225	Stokes v. Lewis, 2 Smith, 12.....	250, 2
Sparrow v. Sir W. Lewis, 8 Taunt.		Stokes, R. v., Cowp. 137.....	3
126.....	138	Stokes v. Woodson, 7 T. R. 6.....	3
Sparrow v. Turner, 2 Wils. 306....	69	Stone v. Atwell, 2 Str. 1076.....	2
Speech v. Blade, 8 Moore, 401.....	113	Stone v. Marsh, 8 D. & R. 71.....	17, 1
Spence v. Albert, 4 Nev. & M. 385, 1		Stone v. Phillips, 4 Bing. N. C. 37..	2
Har. & W. 7.....	199	Stonehouse v. Ramsden, 1 B. & A.	
Spence v. Clarkson, 1 Dowl. N. C.		676.....	137, 138, 2
837.....	258	Storer v. Gordon, 2 Chit. 27.....	1
Spence v. Eastern Counties Railway		Story v. Garry, 8 Dowl. 290.....	2
Co., 7 Dowl. 697.....	246	Story et al, Re, 7 Ad. & El. 602....	1
Spencely v. De Willott, 3 Smith, 321.	5	Stovin v. Taylor, 1 Nev. & M. 250, 1	
Spencer v. Goter, 1 H. Bl. 78.....	126	Dowl. 697 n.....	
Spencer v. Hamerton, 6 Nev. & M. 22,		Stracy v. Blake, 1 Mees. & W. 168..	
1 Har. & W. 700.....	59	Straker v. Graham, 4 Mees. & W. 721,	
Spencer v. Holloway, 15 East, 647..	56	8 Law J., 86 ex.....	
Spicer v. Todd, 2 Cr. & J. 165.....	301		

Table of Cases.

xlii

PAGE	PAGE
Stratton v. Burgess, 1 Str. 114..... 306	Taylor v. Shuttleworth, 8 Dowl. 281. 241, 268
Stratton v. Regan, 2 Dowl. 583. 287, 321	Taylor v. Waters, 5 M. & S. 103 ... 110
Stretch, R. v., 4 Dowl. 30..... 307	Taylor v. Whitworth, 9 Mees. & W. 478 280
Strickland v. Ward, 7 T. R. 681 n. 213	Teasdale v. Atkins, 2 Tidd, 880 244
Strike v. Hill, 1 Mees. & W. 37..... 275	Tebbutt v. Ambler, 12 Law J., 220, qb. 255
Strike v. Blanchard, 5 Dowl. 216.... 277	Temperley v. Scott, 8 Bing. 302 72
Strong v. Dickinson, 5 Dowl. 90.... 87	Tenour v. Smith, 1 Ld. Ken. 141 .. 118
Strutt v. Rogers, 7 Taunt. 213... 250, 255	Tesseyman v. Gildart, 1 New Rep. 292 181
Strutton v. Hawkes, 3 Dowl. 25..... 289	Thomas v. Davies, 8 Ad. & El. 598.. 41
Stubbing v. Hammond, 8 Moore, 689. 197	Thomas v. Desanges et al., 2 B. & A. 586..... 92
Stubbing v. McGrath, 7 Dowl. 328... 209	Thomas v. Edwards, 2 Dowl. 664 ... 14
Stunell v. Tower, 2 Dowl. 673..... 289, 290, 305	Thomas v. Edwards, 1 Cr. M. & R. 362. 16
Stunell v. Tower, 1 Cr. M. & R. 88. 305	Thomas v. Evans, 0 Mees. & W. 820. 302
Sturges v. Claude, 1 Dowl. 506..... 104	Thomas v. Harris, 1 Dowl. N. C. 703. 319
Sturt v. Moggeridge, 2 Tidd, 894.... 261	Thomas v. Hawkes, 9 Mees. & W. 53. 11 Law J., 54, ex. 19
Saccombe v. Babb, 0 Mees. & W. 129 264	Thomas v. Jones, 4 Mees. & W. 28... 23
Summers v. Grosevevor, 3 Cr. & M. 341..... 46	Thomas v. Jones, 6 Dowl. 663..... 33
Sumption v. Monzani, MS. E. 1836. 209	Thomas v. Ld. Ranelagh, 5 Dowl. 258 289
Surman v. Shelleto, 3 Burr. 1698.... 39	Thomas v. Philby, 2 Dowl. 145 254
Sutcliffe v. Eldred, 2 Dowl. 184..... 142	Thomas v. Pritchard, 4 T. R. 604 ... 221
Sutton v. Burgess, 4 Dowl. 376..... 49	Thomas v. Saunders, 3 Nev. & M. 572..... 65, 71
Sutton v. Mitchell, 1 T. R. 20..... 20	Thomas v. Saunders, 1 Ad. & El. 562. 215
Swain v. Hall, 3 Wils. 45..... 3	Thomas v. Williams, 3 Dowl. 655 ... 36
Swain v. Lewis, 3 Dowl. 700..... 11	Thompson v. Atkinson, 6 B. & C. 193. 46
Swann v. Sutton, 10 Ad. & El. 623... 211	Thompson v. Billingsby, 2 Chit. 57. 308
Swayne v. Crammond, 4 T. R. 176... 321	Thompson v. Carter, 3 Dowl. 657 ... 302
Swinford v. Burn, 1 Gow. 7..... 250	Thompson v. Dicus, 2 Dowl. 85... 285, 315
Swinford & Horn, Re, 6 M. & S. 226. 242	Thompson v. Farden, 1 Man. & Gr. 535 182
Swinglehurst v. Altham, 3 T. R. 138. 249	Thompson v. Gibson, 8 Mees. & W. 281 43
Swinerton v. Marquis of Stafford, 3 Taunt. 91..... 12	Thompson v. Gill, 6 Dowl. 155 53
Byles v. Haigh, 4 Dowl. 114, 1 Hodg. 197..... 306	Thompson v. Jennings, 10 Moore, 110. 259
Byles v. McClise, 8 Dowl. 145..... 301	Thompson v. King, 4 Dowl. 582 207
Bynes v. Goodfellow, 4 Dowl. 642, 2 Ring. N. C. 532..... 263	Thoms v. Hawkes, 8 Law J., 214, qb. 247
Symonds v. Parmenter, 1 Wils. 256. 117	Thorn v. Chinnock, 1 Man. & Gr. 216. 56
Symons v. Blake, 2 Cr. M. & R. 416. 8	Thorn v. Leslie, 8 Ad. & El. 195 ... 225
T.	
Tabrum v. Tennant, 1 B. & P. 481.. 116	Thornton v. Hornby, 8 Bing. 13 257
Tanner v. Hague, 7 T. R. 420..... 99	Thornton v. Williamson, 18 East, 191. 63
Tardrew v. Brook, 5 B. & Ad. 880.. 83	Thorp v. Cole, 2 Cr. M. & R. 367, 1 Mees. & W. 531 235
Tarrant v. Morgan, 2 Cr. M. & R. 332 53	Thorpe v. Beer, 2 B. & A. 373..... 318
Taswell v. Stone, 4 Burr. 2454..... 189	Thorpe v. Hook, 1 Dowl. 501, 494... 125, 276
Tattersall v. Groot, 3 B. & P. 253... 197	Thrustout v. Crafter, 2 W. Bl. 826.. 109
Taylor v. Marling, 2 Man. & Gr. 53. 241	Thrustout v. Shenton, 10 B. & C. 110. 169
Taylor v. Blair, 3 T. R. 452 54, 56	Thunder v. Belcher, 3 East, 449.... 149
Taylor v. Cole, 3 T. R. 392 91	Thurlit v. Faber, 1 Chit. 466, 721.... 277
Taylor v. Fenwick, 3 B. & P. 553 n. 214	Thurtell v. Beaumont, 1 Bing. 839 ... 8
Taylor v. Green, 2 Tidd, 941 12	Thwaites v. Sainsbury, 7 Bing. 437.. 18
Taylor v. Gregory, 2 B. & Ad. 774... 244	Tibbs v. Barron, 12 Law J., 33, cp. 118
Taylor v. Lady Gordon, 1 Dowl. 720. 250	Tilby v. Best, 16 East, 103 87
Taylor v. Murray, 3 Mees. & W. 141. 67	Timmins v. Rawlinson, 3 Burr. 1603. 150
Taylor v. Phillips, 3 East, 155..... 316	Tinmouth v. Taylor, 10 B. & C. 114. 208
Taylor, Re, 5 B. & A. 217 238	

Table of Cases.

xiv

	PAGE
all r. Lyon, 1 Dowl. 714	114
allace, R. v., 3 T. R. 408.....	281
allen v. Smith, 5 Mees. & W. 159. 287	
allis v. Goddard, 2 M. & Gr. 912..	134
allis c. Sheffield, 7 Dowl. 793, 9	
Law J., 2, ex.....	102, 312
'alton v. Ingram, 10 Law J., 189, cp	250
'altomshaw v. Marshall, 1 Har. & W. 209	163
'ant c. Reece, 7 Moore, 244	133
'arburton c. Storr, 4 B. & C. 108 ..	239
'ard c. Abrahams, 1 B. & A. 367, 53	55
'ard v. Bell, 2 Dowl. 76.....	61, 69, 82
'ard v. Creasey, 2 Moore, 642	184
'ard c. Dean, 3 B. & Ad. 234. 247, 263	
'ard v. Hall, 9 Dowl. 610	905
'ard v. Levi, 1 B. & C. 268	142
'ard v. Mallinder, 5 East, 489	249
'ard v. Pearson, 5 Mees. & W. 16. 130	
'ard v. Snell, 1 H. Bl. 10	36
'ard v. Thomas, 2 Dowl. 87	200
'ard v. Tummon, 4 Nev. & M. 876. 315	
'ardrop v. Richardson, 1 Ad. & El. 75, 3 Nev. & M. 830	41
'arne v. Beresford, 2 Mees. & W. 283	33
'arne v. Bryant, 3 B. & C. 690.....	244
'arnell v. Young, 5 B. & C. 600 ..	89
'arne v. Wood, 3 Dowl. 262.....	252
'arne v. Smith, 2 Dowl. 216.....	289
'arne v. Thompson, 2 Dowl. N. C. 284	289
'arne v. Rogers, 2 Doug. 637.....	204
'arne v. Rogers, 2 Dowl. N. C. 284	289
'arne v. Cook, 2 M. & S. 348 ..	54
'arman v. Yea, 2 Wils. 41	182
'arkins v. Birch, 4 Taunt. 823 ..	93
'arkins v. Philipotts, 1 M'Clel. & Y. 263	246
'atson v. Fraser, 8 Mees. & W. 660, 204, 205	
'atson v. Holcombe, 11 Law J., 190, cp.....	312
'atson v. M'Cullum, 8 T. R. 520. 235, 238	
'atson v. Maskell, 2 Dowl. 810.....	85
'atson v. Medex, 1 B. & A. 121.....	193
'atson v. Reeve, 5 Bing. N. C. 112. 9	
'atson v. Walker, 8 Bing. 315	275
'atson v. Williamson, 1 Dowl. 607. 280	
'atson v. Potter et al, 11 Law J. 188, cp	2
'ats v. Ball, 1 M. & Gr. 208.....	121
'augh v. Austin, 3 T. R. 437.....	194
'ak v. Callaway, 7 Price, 677	8
'atherhead v. Landles, 5 Dowl. 180. 37	
'aver v. Stokes, 1 Mees. & W. 208. 207	
'ebb v. Brown, 5 T. R. 535	56
'ebb v. Tripp, 11 Law J., 154, qb. 72	
'ebber v. Hutchins, 8 Mees. & W. 819	86, 120

	PAGE
Webber v. Nicholas, 4 Bing. 16	112
Weedon v. Garcia, 2 Dowl. N. C. 64	319
Weedon v. Lipman, 9 Dowl. 111	289
Weekes v. Whiteley, 3 Dowl. 530, 1 Har. & W. 218	305
Weller v. Toke, 9 East, 364	213
Wells v. Benskin, 9 Mees. & W. 45	244
Wells v. Cooke, 2 B. & A. 218	242
Wells v. Ody, 3 Dowl. 799, 1 Gale, 161	65
Wells v. Secret, 2 Dowl. 447	290
Welsh v. Hall, 9 Mees. & W. 14	114
Welsh et al., Re, 1 Dowl. N. C. 331	206
Wenham v. Downes, 5 Nev. & M. 214	322
Wenham v. Downes, 1 Har. & W. 216, 3 Dowl. 573	305, 306
Wenham v. Fowle, 2 Dowl. 444	112
West v. Eyles, 2 W. Bl. 1059	279
West v. Pryce, 2 Bing. 453	110
West v. Rotherham, 2 Bing. N. C. 627	108
Weston v. Foster, 2 Bing. N. C. 701	23
Weston v. Foster, 2 Dowl. 63	33
Weston v. Fournier, 14 East, 491	212
Weston v. Packman, 3 Wils. 49	115
Wettenhall v. Wakefield, 2 Dowl. 759	53, 56
Weyvill v. Stapleton, 1 Str. 617	145
Whale v. Fuller, 1 H. Bl. 222	317
Whalley v. Williamson, 5 Bing. N. C. 200	42
Wharton v. Musgrave, Cro. Jac. 331	35
Whately v. Morland, 2 Cr. & M. 247	200, 202
Wheeler, R. v., 3 Burr. 1256	304
Wheeler, R. v., 1 W. Bl. 311	311
Wheeler v. Whitmore, 4 Dowl. 235	15
Whitaker v. Mason, 4 Bing. N. C. 303	193
White —, v. 1 Dowl. 19	72
White v. Brazier, 3 Dowl. 440	208
White v. Gompertz, 5 B. & A. 905	220
White v. Irving, 2 Mees. & W. 127	272, 280
White v. Prickett, 4 Bing. N. C. 237	51
White v. Sandell, 3 Dowl. 798	9
Whitehead v. Firih, 12 East, 165, 248, 275	248
Whitehead v. Wynn, 5 M. & B. 427	188
Whitwell v. Scheer, 3 Ad. & El. 301	130
Wicks v. Clutterbuck, 2 Bing. 483	2
Wilcox v. Lemon, 8 Dowl. 144	210
Wild v. Holt, 9 Mees. & W. 161	269
Wilkinson v. Allott, Cowp. 366	36, 57, 64
Wilkinson v. Brown, 6 T. R. 524	222
Wilkinson v. Edwards, 1 Bing. N. C. 301	198
Wilkinson v. Malin, 2 Dowl. 65	19, 21
Wilkinson v. Malin, 1 Cr. & M. 240	143
Wilkinson v. Payne, 4 T. R. 468	13
Wilkinson v. Pennington, 6 Dowl. 188	308
Wilkinson v. Time, 4 Dowl. 37	24
Williams v. Andrews, 9 Dowl. 122	186

PAGE	PAGE
Williams v. Breckon, 1 B. & P. 320. 126	Wood v. Duncan, 7 Dowl. 91 26
Williams v. Brown, 2 Dowl. 749. 35	Wood v. Ellis, 2 W. Bl. 1154 11
Williams v. Evans, 2 Mees. & W. 220. 15	Wood v. Heath, 12 Law J., 16, cp. 26
Williams v. Great Western Railway Company, 8 Mees. & W. 556 60	Wood v. Hotham, 5 Mees. & W. 674. 26
Williams v. Higgs, 6 Mees. & W. 133. 286	Wood v. Hurd, 2 Bing. N. C. 166. 4
Williams v. Hockin, 8 Taunt. 435. 282	Wood v. Hurd, 3 Bing. N. C. 45 ... 11
Williams v. Hunt, 1 Chit. 321. 278	Wood v. Hurd, 5 Dowl. 183. 11
Williams v. Mouldsdale, 7 Mees. & W. 134 268	Wood v. Johnson, 2 W. Bl. 1157 ... 18
Williams v. Miller, 1 Taunt. 400 .. 40	Wood v. Moseley, 1 Dowl. 513 2
Williams v. Pantom, 8 Dowl. 701 ... 142	Wood v. O'Kelly, 9 East, 436 26
Williams v. Pratt, 5 B. & A. 696. 11, 134	Wood v. Stephens, 3 Moore, 250. 12
Williams, R. v., 1 Ld. Ken. 470. 119	Wood v. Webb, 3 T. R. 253. 275, 28
Williams v. Roberts, 3 Dowl. 512 ... 299	Woodcock v. Kilby, 1 Mees. & W. 41, 4 Dowl. 730 317, 32
Williams v. Smith, 1 Dowl. 632. 203	Woodcroft v. Jones, Re, 9 Dowl. 538. 22
Williams v. Strahan, 1 New R. 309. 317	Wooderman v. Baldock, 8 Taunt. 676. 2
Williams v. Waring, 2 Cr. M. & R. 354 86, 226	Woodland v. Fuller et al., 11 Ad. & El. 859, 9 Law J., 181, qb. 88, 89, 2
Williams v. Waring, 1 Gale, 268. 87, 88	Woods v. Pope, 1 Bing. N. C. 407. 1
Williams v. Williams, 2 Cr. & M. 473. 321	Woof v. Hooper, 4 Bing. N. C. 449. 24
Willis v. Ball, 1 Dowl. N. C. 303 .. 319	Wooley v. Cloutman, Doug. 330, 244. 52, 5
Willows v. Ball, 2 New Rep. 376. 90	Wooley v. Kelly, 1 B. & C. 68 23
Wills v. Hopkins, 3 Dowl. 346. 108	Wooley v. Sloper, 2 Dowl. 208. 19
Wilson v. Bacon, 1 Dowl. 118. 227	Wooley v. Whitby, 2 B. & C. 580 ... 4
Wilson v. Blakey, 9 Dowl. 352. 281	Wooler, R. v., 6 M. & S. 366 1
Wilson v. The River Dun Company, 7 Dowl. 369 59	Woolfe v. Cooper, 6 Dowl. 617 24
Wilson v. The River Dun Company, 5 Mees. & W. 89. 65	Woolson v. Hodgson, 3 Dowl. 178. 303, 305, 30
Wilson v. Hartley, 7 Dowl. 461 183	Wordall v. Smith, 1 Camp. 553 6
Wilson v. Hunt, 1 Chit. 647. 301	Wordsworth v. Brown, 3 Dowl. 698. 12
Wilson v. King, 2 Cr. & M. 689. 263	Worfield v. Worfield, Latch, 220. 15
Wilson v. Kingston, 2 Chit. 203 83	Worlison's bail, 2 Dowl. 53 11
Wilson v. Lainson, 3 Bing. N. C. 307. 41	Worrall v. Deane, 2 Dowl. 261. 25
Wilson v. Mockler, 1 Dowl. 549. 209	Worsley, Exp., 2 H. Bl. 275 25
Wilson v. Northop, 2 Cr. M. & R. 326 303	Worthington v. —, 2 Cr. M. & R. 315. 27
Wilson v. Parkins, 5 Dowl. 461 67	Wrigglesworth v. Wright, 13 East, 167. 25
Wilson v. Rastall, 4 T. R. 753 2, 12	Wright v. Ager, 5 Moore, 330. 12
Wilson v. Thorpe, 6 Mees. & W. 721. 235	Wright v. Cromford Canal Company, 1 Ad. & El. N. C. 96 26
Wilton v. Chambers, 3 Dowl. 12. 108	Wright v. Gardiner, 3 Dowl. 657. 25
Wilton v. Chambers, 1 Har. & W. 118 277	Wright v. Horton, 6 M. & S. 50. 123, 12
Wilton v. Hamilton, 1 B. & P. 445. 197	Wright v. Horton, Holt, N. P. C. 453. 21
Wiltshire v. Lloyd, Doug. 360. 53, 56	Wright v. Hunt, 1 Dowl. 457 27
Wimall v. Cook, 2 Dowl. 173 36	Wright v. Jones, 2 Smith, 260. 19
Winnepenny v. Bates, 1 Dowl. 550. 238	Wright v. Lewis, 8 Dowl. 298 25
Winter v. Elliot, 3 Nev. & M. 315. 208	Wright v. Lewis, 9 Dowl. 163 18
Winter v. Lethbridge, McClel. 253. 261	Wright v. Nutt, 1 T. R. 388. 13
Winter v. White, 2 Moore, 723 265	Wright v. Nuttall, 10 B. & C. 492 ... 4
Wintle v. Lord Chetwynd, 7 Dowl. 554 89	Wright v. Piggitt, 2 Young & J. 544. 4
Wintle v. Freeman, 11 Ad. & El. 530. 84, 96	Wright v. Skinner, 1 Mees. and W. 144. 5
Witham v. Hill, 2 Wils. 91. 39	Wright v. Skinner, 5 Dowl. 92. ... 114, 22
Wittam v. Urry, 2 Dowl. 543. 52, 25	Wright v. Soresley, 2 Cr. & M. 671.
Wohlenberg v. Lageman, 6 Taunt. 254. 255, 263, 267	Wright v. Stevenson, 5 Taunt. 850. ... 30
Wood v. Cassin, 2 W. Bl. 1157 188	Wrightson v. Bywater, 3 Mees. & W. 190 240, 26
Wood v. Critchfield, 1 Cr. & M. 73. 291, 294	Wyatt v. Curnell, 1 Dowl. N. C. 327. 26
	Wyatt v. Pribble, 5 Dowl. 268. 28
	Wyatt, R. v., 8 Mod. 123 30
	Wykes v. Shipton, 3 Nev. & M. 240. 26
	Wykes v. Shipton, 8 Ad. & El. 264, n. 26
	Wylie v. Pearson, 1 Dowl. N. C. 807. 12

Table of Cases.

xlvii

	PAGE		PAGE
Wynne v. Clark, 5 Taunt. 649.....	314	York, Archbishop of, R. v., 3 Nev. & M. 453	114, 118
Wynne v. Ingleby, 5 B. & A. 625..	91	York, R. v., 5 Burr. 2686.....	303
Wynne v. Wynne et ux., 1 Dowl. N. C. 723	203	Yorkshire, J.J. of W. R., R. v., 3 M. and S. 403.....	281
Wynne v. Wynne et ux., 9 Dowl. 306.	283, 302	Young v. Higgon, 8 Dowl. 212, 9 Law J., 29, m.	213
Y.		Young v. Miller, 3 B. & C. 407	242
Yarworth v. Mitchell, 2 D. & R. 423.	205	Young v. Young, 1 Dowl. N. C. 665.	274
Yates v. Knight, 1 Hodg. 363	248	Younger v. Wilsby, 6 Taunt. 452. 52, 55	
Yates v. Knight, 2 Bing. N. C. 277..	269	Z.	
Yea v. Lethbridge, 4 T. R. 433	181	Zachary v. Shepherd, 2 T. R. 781 ..	258

PROCEEDINGS IN ACTIONS GENERALLY.

CONTINUED FROM VOL. I.

CHAPTER VI.

Proceedings from verdict to judgment and execution.

SECTION I.

New trial.

Where a wrong verdict is given, owing either to a mistake of the judge, or to any error or default of the jurors, witnesses, parties or others, the court will in general order a new trial, on such terms as to costs and otherwise as they may think fit, in order that complete justice may be done between the parties. The cases in which new trials, &c. are granted, and the motion for that purpose, will be treated of under the following heads:—

1. *In what cases.*

For misdirection.] If the judge misdirect the jury, in point of law, and the jury are thereby induced to find a wrong verdict, the court will in general set it aside, and grant a new trial. What amounts to a misdirection, must necessarily depend upon the law, as applicable to each particular case. It is not misdirection, however, if the case never goes to the jury, but the judge nonsuits the plaintiff. *Elworthy v. Bird, M'Clel.* 69. *R. v. Malden, 4 Burr.* 2135. So where the plaintiff's counsel acquiesced in the judge's ruling at the trial, and the defendant took a verdict, without going into his case, the court of Common Pleas refused a new trial on the ground of misdirection. *Robinson v. Cook, 6 Taunt.* 336. So, where inadmissible evidence was received without objection, and the judge on summing up made strong observations upon it, this was holden not to amount to misdirection. *Melin v. Taylor, 2 Hodg.* 3. And to entitle a party to a new trial on the ground of misdirec-

tion, it must appear that the jury were thereby induced to come to a wrong conclusion. *Duke of Newcastle v. Inhabit. of Broxtowe*, 1 Nev. & M. 598. So if, notwithstanding the misdirection, the verdict be in opposition to it, *Twigg v. Potts et al.* 1 Cr. M. & R. 89, or otherwise, according to the justice of the case, *Edmondson v. Machell*, 2 T. R. 4, *Wickes v. Clutterbuck*, 2 Bing. 483, the court will not in general grant a new trial. So, if the misdirection be not material in substance, as if, by mistake, the judge tell the jury that a certain fact was admitted upon the record, whereas in fact it was not, but it was admitted by the parties in the course of the trial, the court will not grant a new trial. *Stracy v. Blake*, 1 Mees. & W. 168. So, where upon the execution of a writ of inquiry the undersheriff erroneously told the jury that a verdict for any amount of damages would carry costs, and they found a verdict for an amount that did not carry costs, the court refused to disturb it. *Grater v. Collard*, 6 Dowl. 503. So, where the judge left to the jury the specific issues that were upon the record, but refused to put to them certain questions suggested by the defendant's counsel, this was holden not to be misdirection, and the court refused a new trial on that ground. *Watton v. Potter et al.* 11 Law J., 138, *cp.* And where there were two issues, and the jury found upon both, but the judge discharged the jury upon the second issue, under a misapprehension that the verdict upon one issue rendered the other useless: the court held that the proper course was, not to move for a new trial, but to apply to the judge to have the verdict corrected according to his notes. *Isles v. Turner*, 3 Dowl. 211. And the court will never grant a new trial, upon the same point on which a bill of exceptions has been tendered. *Fabrigas v. Mostyn*, 2 IV. Bl. 929. Where however the court will grant a new trial for misdirection, they will grant it in penal actions as well as in others. *Wilson v. Rastall*, 4 T. R. 753. *Calcraft v. Gibbs*, 5 T. R. 19.

For the rejection of evidence.] If the judge reject material evidence, as inadmissible, which is tendered by the party who is ultimately unsuccessful, and which ought by law to be admitted, it is in general a good ground for a new trial. As for instance, if he reject a witness as incompetent, whom the court afterwards decide to be competent, *Robinson v. Williamson*, 9 Price, 136, or refuse to receive secondary evidence of a lost document, which the court afterwards hold ought to have been received, *Freeman v. Arkell*, 2 Brod. & B. 494, or the like, the court will in general grant a new trial. See *Gravenor v. Woodhouse*, 1 Bing. 38. *Duncan v. Hill*, 2 Brod. & B. 682. And in general the court will grant a new trial for the rejection of evidence, unless it appear that even if the evidence had been admitted, a verdict for the party offering it would be clearly and manifestly against the weight of evidence. *Crease v. Barrett*,

1 Cr. M. & R. 919, 1 Tyr. & Gr. 735. But where a witness was erroneously rejected as incompetent, and the facts he could have proved were proved by another witness, and were not in fact controverted: the court refused to grant a new trial. *Edwards v. Evans*, 3 East, 451. So, where it appeared that the evidence rejected, if admitted, would not have altered the case, or established any fact not already proved by other evidence, a new trial was refused. *Alexander v. Barker*, 2 Tyr. 140, and see *Doe v. Ross*, 7 Mees. & W. 102. So, where evidence was rejected, which was not admissible for the purpose for which it was tendered, but was admissible in another view of the case not alluded to at the trial, the court refused a new trial. *R. v. Grant*, 3 Nev. & M. 106.

Wrong admission of evidence.] If the judge at the trial admit evidence, which ought not to be received, the court will grant a new trial, without considering what effect it had or was calculated to have upon the jury, or whether there was evidence sufficient without it to sustain the verdict. *Doe d. Tatham v. Wright*, 1 Har. & W. 729, and see *De Ruitzen v. Farr*, *Id.* 735, 5 Nev. & M. 617, but see *Doe v. Tyler*, 6 Bing. 561, *Edgell v. Francis*, 1 Man. & Gr. 222, *semb. cont.* But if the evidence have not been objected to by the counsel for the opposite party, the court will not grant that party a new trial, although the judge in summing up may have made strong observations upon it. *Melin v. Taylor*, 2 Hodg. 3. Nor will the court grant a new trial, on the objection to the applicability of evidence, unless the objection were made at the trial before the summing up. *Abbott v. Parsons*, 7 Bing. 563.

Verdict against evidence.] If the jury come to a wrong conclusion, upon the facts, admitted or proved, *Bright v. Eynon*, 1 Burr. 390. *Turner v. Meymott*, 1 Bing. 158, or from a misapprehension of the law of the case, although there have been no misdirection, *Gregory v. Tuffs*, 1 Cr. M. & R. 310, the court will in general grant a new trial, even although the verdict may probably accord with the justice of the case; *Farrant v. Omins*, 3 B. & A. 692; they usually grant it, however, only on payment of costs. *Doe v. Pike*, 1 Nev. & M. 385. But where there is evidence on both sides, the court seldom grant a new trial, even although the judge be not satisfied with the verdict, *Anon.* 1 Wils. 22, or report that it was against the weight of evidence; *Swain v. Hall*, 3 Wils. 45; they have a right no doubt to do so, if they think fit, but they seldom interfere except in extraordinary cases, where the verdict is very much against the weight of evidence. *Mellin v. Taylor*, 3 Bing. N. C. 109, and see *Foster v. Steele*, *Id.* 892. So, in an action for damage to a vessel by another running foul of her, the court refused to

set aside a verdict for the plaintiff, on a suggestion that was some ground to believe that the plaintiff was also negligent in the navigating of his vessel at the time of the accident. *Collinson v. Larkins*, 3 Taunt. 1. So, in a horse cause, the question of soundness or unsoundness was one peculiar for the consideration of the jury upon the evidence, the court refused to grant a new trial, merely on the ground of the verdict being against the preponderance of the evidence. *La Peate*, 7 Taunt. 153. So, where the jury found a verdict against the evidence of a witness, and the credibility of the witness left to the jury, the court refused a new trial, although there was nothing to impeach the witness's credit. *Lacey v. Fox*, 3 Dowd. 668.

[For excessive damages.] If the jury give excessive damages the court may in all cases award a new trial. *Ducker v. Ducker*, 1 T. R. 277. *Hewlett v. Crutchley*, 5 Taunt. 277. Even in actions for personal injuries, they have done so. see *Jo Sparrow*, 5 T. R. 257. *Goldsmith v. Ld. Sefton*, 3 Anst. 1. But they do not usually interfere in this way in actions for personal injuries, see *Fabrigas v. Mostyn*, 2 W. Bl. 942. *Gilbert v. Burtenshaw*, Coup. 230. *Farmer v. Darling*, 4 T. R. 191, or malicious prosecution, *Dubois v. Keats*, 9 Law J., unless the damages be outrageous, see *Sharpe v. Sharpe*, 2 W. Bl. 942. *Leith v. Pope*, 2 W. Bl. 1327. *Edgell v. F. 1 Man. & Gr.* 222, or it appear that improper topics have been urged before the jury: *Dubois v. Keats*, 9 Law J. 66, *qb.*: 200*l.* in an action for an assault, where both parties were gentlemen, *Gray v. Grant*, 2 Wils. 252,—1000*l.* for imprisonment under a secretary of state's warrant, a servant entering the plaintiff's house and seizing his papers, *more v. Carrington*, 2 Wils. 244,—300*l.* for false imprisonment of a journeyman printer, under a warrant from a secretary of state, *Huckle v. Money*, 2 Wils. 205,—200*l.* for breaking into the plaintiff's house, to search for prohibited goods where none were found, *Redshaw v. Brook*, 2 Wils. 405,—for a forcible entry into a gentleman's mansion house, on a distress for rent, to enforce a claim to the property which there was no foundation, *Bland v. Bland*, 1 Har. 167,—150*l.* in an action for not removing tithes, *Ba Leathes*, Wightw. 113,—3500*l.* against an attorney of property, for breach of promise of marriage, *Wood v. Wood*, 2 Bing. N. C. 166,—have not been deemed excessive. will the court, in general, set aside a verdict for excessive damages, in actions for seduction, *Bennett v. Allcot*, 2 T. R. 166. *Tullige v. Wade*, 3 Wils. 18, or in actions for criminal conversation, *Duberley v. Gunning*, 4 T. R. 651, unless the jury acted from undue motives, or from

error or misconception. *Chambers v. Caulfield*, 6 East, 244. Nor will they set aside a verdict for excessive damages, in an action on a bill of exchange or promissory note, where the verdict is not for more than the amount of the bill or note, although it be alleged that a less sum is due. *Seally v. Powis*, 1 Har. & W. 2. So, where the damages given were calculated on a principle assented to by the counsel on both sides at the trial, the court refused to reduce the damages or grant a new trial, on the alleged ground that the counsel were mistaken in that which they assumed to be the basis of their calculations. *Hilton v. Fowler*, 5 Dowl. 312. But in an action for damage to property, or for diverting a watercourse, or the like, if the damages greatly exceed the amount of the injury done, the court will grant a new trial. *Pleydell v. Ld. Dorchester*, 7 T. R. 529. If upon showing cause against a rule for setting aside a verdict for excessive damages, the plaintiff consent to the verdict being reduced to a fair amount, the court will in general discharge the rule on those terms. See *Leeson v. Smith*, 4 Nev. & M. 301.

For smallness of damages.] The court will seldom interfere, by granting a new trial or otherwise, where the damages are less than the evidence would warrant. See *Dyball v. Duffield*, 1 Chit. 266 (a). *Rendall v. Hayward*, 5 Bing. N. C. 424. And therefore, where in trespass for shooting a dog, the evidence was that the dog was worth 50s., but the jury gave 20s. damages only, the court refused to interfere, either by increasing the damages or granting a new trial. *Cann v. Facey*, 1 Har. & W. 482. So, where in an undefended action on a mortgage deed, a verdict was taken by mistake for the principal only, and not the interest, the court refused to increase it by adding the interest; all that could be done in such a case, was to grant a new trial. *Baker v. Brown*, 5 Dowl. 313. So, where the jury gave a verdict for a shilling damages, under the mistaken impression that it would carry costs, the court refused a new trial. *Mears v. Griffin*, 1 Man. & Gr. 796.

For default, &c., in the jurors.] For any misconduct of the jury, showing that justice has not been done by them, or that the trial has not been conducted in a proper manner, the court will award a new trial. *Hughes v. Budd*, 8 Dowl. 315. Where it appeared that handbills, reflecting on the character of the plaintiff had been distributed in court, and shown to the jury, on the day of trial, and a verdict was found for the defendant, the court set aside the verdict and granted a new trial, although the defendant's attorney denied all knowledge of the handbills; and the court refused to receive affidavits from the jurors in contradiction. *Coster v. Merest*, 3 Brod. & B. 272. See *Spenceley v. De Willot*, 3 Smith, 321. Where, upon the judge

summing up in favour of one of the parties, he was stopped by the jurors, who declared themselves satisfied, and then immediately found for the other party, the court granted a new trial. *Gainsford v. Blachford*, 6 Price, 36. But where, upon an issue consisting of three facts, the jury, whilst the judge was summing up, expressed themselves satisfied as to one of these facts in favour of the plaintiff, and the judge told them, that to warrant a verdict for the defendant, they must find all these facts in his favour;—their afterwards finding for the defendant generally, was holden to be no ground for a new trial. *Napier v. Daniel et al.*, 3 Bing. N. C. 77. And the court have refused to receive an affidavit, tending to impeach a verdict, by stating corrupt motives in one of the jurors, *Hindle v. Birch*, 8 Taunt. 26, or stating what one of the jury had admitted to the attorney in the cause; *Straker v. Graham*, 4 Mees. & W. 721, 8 Law J., 86, *ex.*; nor will they receive the affidavit of one of the jury. *Id.* But this extends only to what may have passed in the jurors' room, or privately amongst the jury; and not to any thing which may have passed in open court, which may be deposed to either by one of the jurors, *Roberts v. Hughes*, 7 Mees. & W. 399, or any other person who may have been present at the time. So, a mistake in the panel, in the name of one of the jurors, is no ground for a new trial; *Dickenson v. Blake*, 7 Bro. P. C. 177; or if a wrong person appear and be sworn on the jury by mistake, even as a special juror, it is entirely in the discretion of the court to grant a new trial or not; and they will not do so, if it appear probable that the party or his attorney was aware of the mistake, whilst the trial was proceeding. *Earl Falmouth v. Roberts*, 1 Dowl. N. C. 633, 11 Law J., 180, *ex.*

For default in witnesses, &c.] If a verdict pass against a party, on account of the absence of a material witness, the court will not on that ground set it aside and grant a new trial, even although such absence be caused by the fraud or contrivance of the attorney of the opposite party; *Turquand v. Dawson*, 1 Cr. M. & R. 709; for the party should have applied to put off the trial. *Elmslie v. Wildman*, 8 Taunt. 236. *Edwards v. Dignam*, 2 Dowl. 642, but see *Shillito v. Theed*, 6 Bing. 753. But where, upon a writ of trial, after the jury were sworn, an application was made to the undersheriff to put off the trial, on account of the absence of a material witness, which he refused to do: on application for a new trial, the court thought it was too late, after the jury were sworn, to make the application, and that the application ought to be made to a judge at chambers; but as there was an affidavit of merits, they granted a new trial on payment of all costs. *Packham v. Newman*, 3 Dowl. 165. So, the incompetency of a witness, not discovered until after the trial, is not of itself a

sufficient ground for moving for a new trial; *Turner v. Pearte*, 1 T. R. 717; and it has been refused, even where it was alleged that the witness examined was in fact the plaintiff in the action, *Deudeney v. Palmer*, 7 Dougl. 177, or his partner. *Walker v. Needham*, 1 Dougl. N. C. 220. Nor is it a ground for a new trial, that a witness who described himself as a Christian, and was sworn on the New Testament, was really a Jew; for he might, notwithstanding, be indicted for perjury. *Sells v. Hoare*, 3 Brod. & B. 232. Nor is it a ground for a new trial, that upon a witness being objected to as incompetent, he was examined, upon the attorney undertaking to have a release executed, and that since the trial the attorney refused to do so. *Heming v. English*, 1 Cr. M. & R. 568. So, the court refused to grant a new trial, on an affidavit that a material witness, who from misapprehending the nature of a release refused to execute one at the trial, had since consented to do so. *Macbeath v. Ellis*, 4 Bing. 578. So, an affidavit, contradicting a witness in what he said at the trial, will not be a sufficient ground for a new trial, *Feise v. Parkinson*, 4 Taunt. 640. and see *Sprague v. Mitchell*, 2 Chit. 271. *Aliken v. Howell*, 1 Nev. & M. 191, but see *Lister v. Mundell*, 1 B. & P. 427, even although the evidence appear to have been fraudulent on the part of the witness, if no fraud be imputable to the party himself. *Branson v. Didsbury*, 12 Ad. & El. 631. But if subornation of the witnesses have been found out since the trial, the court will grant a new trial. *Fabrilus v. Cock*, 3 Burr. 1771. On an affidavit, however, from a material witness, that he had made a mistake in his evidence, the court of Common Pleas granted a new trial. *Richardson v. Fisher*, 1 Bing. 145.

[For default in parties.] The court will not generally grant a new trial, on the ground that the party had other evidence, not produced at the trial, sufficient to have gained him the verdict, *Cooke v. Berry*, 1 Wils. 98. *Harrison v. Harrison*, 9 Price, 89, even although the evidence were in his briefs at the trial, and his counsel thought right not to adduce it. *Spong v. Hogg*, 2 W. Bl. 802. *Hall v. Stothard*, 2 Chit. 267. So, where papers are in the possession of a party, at the time of the first trial, which would have furnished him with a defence, if he had used due diligence in looking over them, the court will not grant a new trial, for the purpose of letting in such evidence, See *Dixon v. Graham*, 5 Dougl. 267. Nor will the court grant a new trial for the purpose of letting in a defence, of which the party was apprised at the trial. *Vernon v. Hankey*, 2 T. R. 113. *Pickering v. Dowson*, 4 Taunt. 779. Where indeed certain evidence was not produced, owing to the mistake of a witness, the court granted a new trial. *D'Aguilar v.*

Tobin, 2 *Marsh*. 265. So, where new evidence is discovered since the trial, such as to satisfy the court that if the party had it at the trial, he must have had a verdict, the court will grant a new trial; *Brodhead v. Marshal*, 2 *W. Bl.* 955, *Weak v. Callaway*, 7 *Price*, 677. *Thurtell v. Beaumont*, 1 *Bing.* 339; but the discovery of a new witness, to impeach the testimony of a witness at a former trial, is not a sufficient ground. *Dickenson v. Blake*, 7 *Bro. P. C.* 177. And where a new trial is moved for by a defendant, on a ground connected with his defence, the court will not grant it, if there appear to be a material defect in the defendant's evidence, although the objection have not been made by the plaintiff at the trial. *Davies v. Morgan*, 1 *Crompt. & J.* 587. Where a plaintiff was nonsuit, in consequence of the defendant's counsel at the trial refusing to admit certain documents in evidence, which the defendant's attorney (who was then absent) had before agreed to admit: the court granted a new trial, with costs to be paid by the defendant; and they would have ordered the attorney to pay them, if he had been present at the trial, or had given instructions to counsel to make the objection. *Doe d. Tindal v. Roe*, 5 *Dowl.* 420. Where an action against an insurance company was defended on the ground that the plaintiff had wilfully set his house on fire, but the plaintiff obtained a verdict: the court refused a new trial, on the ground that the grand jury had since found a bill against the plaintiff for the offence imputed to him; but upon an affidavit detailing the facts of a conspiracy by the plaintiff and others to defraud the insurance company in that particular transaction, and stating that those facts had not come to the knowledge of the defendants until after the trial, a rule for a new trial was granted, on payment of costs. *Thurtell v. Beaumont*, 1 *Bing.* 339. So, in an action for words imputing felony, the court refused to set aside a verdict for the plaintiff, upon affidavits showing that he had been since indicted and convicted of the very felony imputed to him. *Symons v. Blake*, 2 *Cr. M. & R.* 416. So, the court will not grant a new trial, merely because an indictment for perjury in the cause, has been preferred and found against the witnesses, on whose evidence the verdict was obtained; *Seeley v. Mayhew*, 4 *Bing.* 561; but they will, if the witnesses have been convicted. *Beerfield v. Petrie*, 2 *Tidd.* 938.

If it appear that the party for whom the verdict is afterwards given, entertained or treated any of the jurors, it is discretionary with the court whether they will set aside the verdict or not; and where in a cause which lasted two days, two of the jurors dined and slept at the defendant's house after the first day's trial, and before the judge had summed up, but all imputation that they were influenced by it was

disclaimed by the plaintiff, the court refused to disturb a verdict for the defendant. *Morris v. Vivian et al.*, 11 *Law J.*, 367, *ex.*

For default of the party's attorney.] Where a verdict passed against a defendant, through the negligence of his attorney, and he moved for a new trial on this ground, and that he had been kept in ignorance of the state of the cause by his attorney, adding that he had a good defence to the action on the merits: the court of King's Bench refused a new trial, suggesting that he might have his remedy against his attorney. *Moody v. Dick*, 4 *Nev. & M.* 348. The court of Common Pleas, in a similar case, granted a new trial, and ordered the defendant's attorney to pay the costs, as between attorney and client; *De Rouffigny v. Peals*, 3 *Taunt.* 484; but in a later case they refused it. *Watson v. Reeve et al.*, 5 *Bing. N. C.* 112. And where the plaintiff was nonsuit, by reason of his attorney's clerk not attending at the trial, the court of Exchequer would only grant a new trial, upon the terms of the plaintiff's attorney paying all the costs attending the trial. *White v. Sandell*, 3 *Dowl.* 798. But where a verdict for the plaintiff was taken by consent, notwithstanding the defendant had previously informed his counsel that he did not consent to it, the court refused a new trial, as it appeared that the defendant was in court at the time and did not openly dissent from it, or apprise the opposite party that he would not accede to it. *Wright et al. v. Soresley*, 2 *Cr. & M.* 671.

For default of the sheriff or other officer.] Where a verdict was given for a defendant, it was holden to be no ground for a new trial, that the defendant's attorney was undersheriff, and that the jury had been summoned by him. *Mason v. Vickery*, 1 *Smith*, 304. *Briggs v. Sowton*, 9 *Dowl.* 105. Where the *distringas juratores* was not returned at the time of the trial, the court refused a new trial, saying that the party might bring a writ of error if he would. *Gee v. Swann*, 11 *Law J.*, 291, *ex.* At the assizes for Yorkshire, where two cause lists are made out, one for the East and North Ridings, and the other for the West Riding, the judge's marshal by mistake entered a cause in one list, which ought to have been entered in the other; and the cause being tried as undefended, in the absence of the defendant and his attorney, the court set aside the verdict and granted a new trial. *Hunter v. Hornblower*, 3 *Dowl.* 491.

For irregularity at the trial.] If a trial take place, without any notice of trial having been given to the defendant, the court will of course award a new trial. *Shepherd v. Thompson*, 1 *Dowl. N. C.* 345. But if, in such a case, the defendant appear

at the trial, and take his chance of succeeding there, he will not be allowed afterwards, unless under very particular circumstances, to object to the notice of trial, or to say that there was none. *Figg v. Wedderburne*, 11 *Law J.*, 45, *qb.* Where a verdict was entered for the plaintiff instead of the defendant, by a mistake of the undersheriff before whom it was tried, the court granted a new trial, upon an affidavit of the fact made by one of the jury, the court holding that there was no objection to the receiving of an affidavit of a juror as to what took place in open court. *Roberts v. Hughes*, 1 *Dowl. N. C.* 82. Where a plaintiff gave the defendant notice that he would have the cause tried as an undefended cause; but when the cause was called, the defendant's counsel said it was defended, and it accordingly was not tried; in two days afterwards, however, the plaintiff again took the cause down for trial, and had it tried as an undefended cause, without any new notice, or setting it down in the paper: the court granted a new trial, without payment of costs. *Sprigge v. Rutherford*, 2 *Dowl.* 429. But where a cause, which was several days in the written list at *nisi prius*, was at last tried out of its turn, as undefended, in the absence of the defendant's attorney, the court granted a new trial only on payment of costs, saying that the fact of a cause being in the written list, is notice to the attorney that it may be tried at any time during the day; *Fourdrinier v. Bradbury*, 3 *B. & A.* 328; and in a later case, they also required an affidavit of merits. *Blackhurst v. Balmer*, 5 *B. & A.* 507, and see *Nash v. Swinburne*, 1 *Dowl. N. C.* 190. And even on payment of costs, the court have refused to let a defendant in to try, where he had an opportunity of doing so, but permitted a verdict to be taken against him as in an undefended cause. *Breach v. Casterton*, 7 *Bing.* 224. In the court of Queen's Bench, if the marshal enter a cause as undefended for the day on which undefended causes are taken in Middlesex, the defendant, if he mean to defend it, must instruct counsel to appear on that day, and state that it is defended, or, at least, he must give the plaintiff notice to that effect; and if, in default of his doing this, the plaintiff try the cause as undefended, and obtain a verdict, the court will not set aside the verdict, except on payment of costs, even upon an affidavit of merits. *Bland v. Warren*, 7 *Ad. & El.* 11. So, where a record was taken down for trial by proviso, and, the plaintiff not appearing, a verdict for the defendant was taken by mistake, instead of a nonsuit: the court refused to set aside the verdict, except upon the terms of the plaintiff consenting to a nonsuit being entered instead of it. *Hodgson v. Forster*, 1 *B. & C.* 110.

[For error in the pleadings, &c.] The court will not grant a new trial at the instance of a defendant, for any defect in the

declaration, which might be made the subject of a motion in arrest of judgment. *Lane v. Crockett*, 7 Price, 566. So, where the plaintiff proceeded to trial, without adding the similitur to a plea concluding to the country, and obtained a verdict; a new trial being moved for on this ground, the court held that as the plea concluded with an "&c.," the "&c." might after verdict be deemed to include the *similitur*, and they therefore refused the rule. *Swain v. Lewis*, 3 Dowl. 700. Where a defendant moved for a new trial in an action of slander, to enable him to plead specially a justification which he was not permitted to give in evidence under the general issue, the court refused it, even on payment of costs. *Kirby v. Simpson*, 3 Dowl. 791. And the same where the new trial was for the purpose of enabling the defendant to amend a plea of right of way, which described the line of way incorrectly. *Edwards v. Broxton*, 2 Crompt. & J. 18.

Where a plaintiff was nonsuit, for a trifling variance between the contract set out and that proved, the court granted a new trial on payment of costs, with leave to the plaintiff to amend, and to the defendant to plead *de novo* or demur. *Williams v. Pratt*, 5 B. & A. 896. But in a similar case, the court of Common Pleas refused this. *Brown v. Knill*, 2 Brod. & B. 395. Where in ejectment, a new trial was moved for, on the ground of variance between the record of *nisi prius* and the issue, in the description of the premises; the court refused it, as it was not shown how they were described in the declaration. *Doe v. Wylde*, 2 B. & A. 472. Nonsuits for variance, &c., now seldom occur, on account of the power possessed by the judge at *nisi prius* to amend during the trial. See *post*, tit. "Amendment." And where in debt on bond, on a writ of trial before the sheriff, there was a variance between the bond set out and that proved, in the amount, and the undersheriff refused to nonsuit the plaintiff, but allowed him to take a verdict: the court refused to set it aside. *Hill v. Satter*, 2 Dowl. 380.

[Where a party is taken by surprise.] Where the party shows that the case set up by his adversary was a surprise upon him, and that had he known it he could have met it by evidence: if the court be satisfied of this, and that it is essential to the ends of justice that the case should be submitted to a jury a second time, they will usually grant a new trial. But they will not in general grant a new trial, on the ground that a witness gave different evidence from what was expected by the party calling him. *Hewlett v. Crutchley*, 5 Taunt. 277. So, where a witness proved a fact to the surprise of the other party, the court refused a new trial on that ground, although it appeared that by mistake he was not cross-examined, nor was any observation made upon his testimony, or any evi-

dence given to contradict him. *Bell v. Thompson*, 2 Chit. 194. and see *Harrison v. Harison*, 9 Price, 89.

In cases of contested rights to land, &c.] Where there had been but a short time for investigating a question of a doubtful and obscure nature, relating to real property of great value, although conflicting evidence had been left to the jury, and the court did not think their verdict wrong, yet as the inheritance was to be bound for ever by the verdict, they granted a new trial on payment of costs. *Swinnerton v. Marquis of Stafford*, 3 Taunt. 91. So, in an action for tolls of a market, the court granted a new trial, in order that a second jury might say whether they could presume a grant from the crown of such tolls, subsequent to the original charter. *Louden v. Hierons*, 2 Moore, 102.

In penal actions.] In penal actions, where there is a verdict for the defendant, or the plaintiff is nonsuit, the court will not grant a new trial, *Hooper v. Cobb*, 2 Tidd. 941. *Fonereaux v. —*, 3 Wils. 59. *Rawston v. Etteridge*, 2 Chit. 273. *Brooke v. Middleton*, 10 East, 269, except for misdirection. *Wilson v. Rastall*, 4 T. R. 753. *Calcraft v. Gibbs*, 5 T. R. 19. But they will, in actions by parties grieved. *Ld. Selsea v. Powell*, 6 Taunt. 297. And in one case, in an action for penalties, where the evidence for the plaintiff was clear and positive, and might have been answered if false, the jury having required the statute by which the penalties were created to be handed to them, with which they retired, and afterwards returned with a verdict for the defendant: the court, considering that the jury must have put a wrong construction on the statute, and that it was equivalent to a misdirection, granted the plaintiff a new trial. *Gregory v. Tuffs*, 2 Dougl. 711.

In hard or trifling actions.] In trifling actions, if the defendant have a verdict, the court will seldom grant a new trial, unless for misdirection, or for fraud or malpractice, or the judge have given the defendant leave to move, *Hooper v. Cobb*, 2 Tidd. 941. *Taylor v. Green*, *Id.* *Brooke v. Middleton*, 10 East, 268, or unless the action is brought to try some right; *Turner v. Lewis*, 1 Chit. 265; they have refused to grant it, not only in the case of a verdict against evidence, but also where the application was made on the ground of surprise and of fresh evidence being found. *Bransdon v. Didshury*, 9 Dougl. 199, 10 Law J., 10, qb. And an action is said to be trifling in this respect where the damages are under 20l. *Woods v. Pope*, 1 Bing. N. C. 467. *Taylor v. Green*, 2 Tidd. 941. *Jones v. Dale*, 9 Price, 591. *Manning v. Underwood*, 1 M'Lel. & Y. 266, see *Roberts v. Carr*, 1 Taunt. 495. *Marsh v. Bower*, 2 W.

Bl. 851. *Green v. Speakman*, 8 Moore, 339. — *v. Phillips*, 1 Cramp. & M. 26. So, if a verdict be given for the defendant, the court will not grant a new trial, if it appear from the evidence that the plaintiff, if he had succeeded, would not have been entitled to 20l. damages. *Haine v. Davey*, 2 Har. & W. 30, and see *Burton v. Thompson*, 2 Burr. 664. But this rule does not apply to cases, where the trial has been before the sheriff under a writ of trial; *Edwards v. Dignam*, 2 Dougl. 642; in such cases the court will grant a new trial, unless the verdict be under 5l. *Packham v. Newman*, 1 Cr. M. & R. 585. *Vide post*.

If the defendant have a verdict in a hard or vexatious action, the court will seldom grant the plaintiff a new trial. *Macrae v. Hull*, 1 Burr. 11. *Penprase v. Johns*, 2 Nev. & M. 376. *Johnson v. Piper*, *Id.* 672. On the other hand, where the plaintiff has a verdict, the court will not in general grant a new trial to let in an unconscionable defence, or one not according with the merits of the case. *Gist v. Mason*, 1 T. R. 84. *Tullidge v. Wade*, 3 Wils. 18. If a fair legal objection, however, be taken at the trial, and overruled by the judge, without reserving the point, and the court afterwards be of opinion that it was a good ground of nonsuit, although the court in such a case cannot order a nonsuit to be entered, they will grant a new trial. *Minchin v. Clement*, 1 B. & A. 252, and see *Ritchie v. Bowfield*, 7 Taunt. 309. But where the verdict is according to the justice of the case, the court will seldom interfere to disturb it, *Aylett v. Lowe*, 2 W. Bl. 1221. *Sampson v. Appleyard*, 3 Wils. 272, even although there have been misdirection. *Edmonson v. Machell*, 2 T. R. 4. *Wilkinson v. Payne*, 4 T. R. 468. *Cox v. Kitchen*, 1 B. & P. 338. Where, however, in an action upon a covenant for an increased rent of land converted into tillage, the jury instead of giving the increased rent, gave damages for the actual injury sustained, the court granted a new trial, and without payment of costs, although it was urged that the verdict was according to the justice of the case. *Farrant v. Olmins*, 3 B. & A. 692.

[*Setting aside a nonsuit.*] If the judge at the trial, from mistake of law, nonsuit the plaintiff, the court in general, upon application, will set aside the nonsuit, and grant a new trial. But where the plaintiff's counsel, after the judge had begun to sum up, proposed to be nonsuit, and the plaintiff was nonsuit accordingly, the court held that he could not afterwards move to set aside the nonsuit. *Simpson v. Clayton*, 2 Bing. N. C. 467, 1 Hodg. 463. *Butler v. Dorant*, 3 Taunt. 229. *Barnes et al v. Whiteman*, 9 Dougl. 181. But if the plaintiff's counsel submit to be nonsuit, from deference to the opinion of the judge, if that opinion be incorrect, the court will set aside the nonsuit and grant a new trial. *Alexander v. Barker*, 2 Tyr. 140.

Setting aside a verdict, and entering a nonsuit.] If there be doubt at the trial, on a point of law, whether the action will lie or whether the plaintiff has proved his case, the judge, instead of nonsuiting the plaintiff, may direct a verdict to be found for him for such damages as the jury may think him entitled to, and may then give the defendant leave to move the court to set aside the verdict and enter a nonsuit. Afterwards when the case comes before the court, and they have the whole fact before them on the judge's notes, they may consider, not merely the point of law reserved, but the whole case, and come to such decision as they think the facts warrant. *Doe v. Dodd* 2 Nev. & M. 838. The defendant, however, cannot move thus to enter a nonsuit, unless leave for that purpose have been given to him by the judge at the trial; *Minchin et al. v. Clemens* 1 B. & A. 252. *Rickets v. Burman*, 4 Dowl. 578; although where there is a verdict for the defendant, the court in some cases have ordered it to be set aside and a nonsuit entered, to enable the plaintiff to bring another action for the same cause where his right to property savouring of the realty, or the like would be concluded, if the defendant's verdict were allowed to stand. *Lee v. Shore*, 2 D. & R. 198. *Hodgson v. Forster*, 16 221. So, the court, instead of ordering a nonsuit to be entered, have granted a new trial, the plaintiff agreeing to pay all the costs of the former trial. *Doe v. Stagg*, 9 Law J., 73, cp.

To set aside the execution of a writ of inquiry.] The execution of a writ of inquiry may be set aside for the same defect as a verdict, and a new writ awarded; see *Baylis v. Lucas* Cowp. 112. *Irwin v. Dearman*, 11 East, 23. *Elliott v. Nicklin* 5 Price, 641; and the court will refuse the rule, in all cases where under the same circumstances they would refuse a new trial. See *Grater v. Collard*, 6 Dowl. 503. In moving for the rule, the undersheriff's notes, verified by affidavit, are produced to the court, but the rule is drawn up on reading the affidavit only; *Stephens v. Pell*, 2 Dowl. 629; and if there be any delay in obtaining the notes, the court will allow a further time for making the motion, or if the undersheriff refuse to give them, the court will probably oblige him. *Thomas v. Edwards*, 2 Dowl. 664. The rule may be moved for at any time before final judgment is signed. *Denny v. Trapnel*, 2 Wils. 378

To set aside a verdict on a writ of trial.] The court will set aside a verdict before the sheriff, &c., upon a writ of trial, not only for misdirection, but for any other cause for which they would set aside a verdict in ordinary cases. That the cause of action is not such as is the subject of a writ of trial, is not in strictness a ground for setting aside the verdict, but is the subject of an application to set aside the proceeding for irregularity; *Walker v. Needham*, 1 Dowl. N. C. 220; and the court

feel a great disinclination to entertain such a motion, if made by the party who obtained the order for the writ of trial. *Price v. Morgan*, 2 *Mees. & W.* 53. *Walker v. Lee*, 11 *Law J.*, 58, *cp.* The rule which prohibits a motion for a new trial, where the amount recovered or to which the party is entitled, is under 20*l.*, does not extend to new trials upon writs of trial; *Edwards v. Dignam*, 2 *Dowl.* 642; the rule as to writs of trial, in this respect, is, that the court will not grant a new trial, where the damages are under 5*l.*, *Packham v. Newman*, 1 *Cr. M. & R.* 585. *Fleetwood v. Taylor*, 6 *Dowl.* 796, unless for misdirection or fraud; even where it appeared that the action was one of several, brought by different plaintiffs for aliquot parts of a sum exceeding 5*l.*, the court refused the rule. *Wilkins v. Evans*, 2 *Mees. & W.* 220. On the other hand, if the sum indorsed upon the writ exceed 20*l.*, and the case be tried before the sheriff, the court will set aside the verdict. *Edge v. Shaw*, 4 *Dowl.* 189. So, if the cause be tried in the absence of the defendant, before the time mentioned in the notice of trial, the court will set aside the verdict, and with costs. *Hanslow v. Wilks*, 5 *Dowl.* 295. But where there was a variance between the bond declared upon and that produced in evidence, in the amount, and the undersheriff refused to nonsuit the plaintiff, but left the case to the jury, who found a verdict for the plaintiff; the court refused a new trial for the variance, although no amendment had been made, nor the facts found specially, according to stat. 3 & 4 *W. 4*, c. 42, s. 24. *Hill v. Salter*, 2 *Dowl.* 380. A nonsuit however cannot be entered, at the instance of the defendant, unless the undersheriff have expressly given him leave to move for it. *Ricketts v. Burman*, 4 *Dowl.* 578.

The motion must be made within four days after the return of the writ of trial; otherwise the court will not entertain it, *Wheeler v. Whitmore*, 4 *Dowl.* 235. *Price v. Trenchard*, 1 *Dowl. N. C.* 298, even although the party have been prevented from moving in time, for want of the sheriff's notes. *Anon.* 1 *Har. & W.* 146. And it is no objection, if the application be made within such time, that judgment has already been signed and execution issued. *Angel v. Ihler*, 9 *Law J.*, 8, *ex.* A copy of the notes of the undersheriff or other presiding officer, verified by affidavit, must be produced to the court, at the time of moving for the rule; *Muppin v. Gillatt*, 4 *Dowl.* 190. *Burney v. Moxal*, 3 *Nev. & M.* 472, *n.* *Johnson v. Wells*, 2 *Cr. & M.* 428. *Grainge v. Shopper*, 2 *Dowl.* 644. *Eden v. Bretten*, 9 *Dowl.* 245; and see *Doctor v. Stanley*, 9 *Law J.*, 199, *cp.*, or it must be stated, on affidavit, that an application was made to the undersheriff for his notes, and that he refused to give them, and his reasons for doing so, if he have given any. *Hall v. Middleton*, 1 *Har. & W.* 7, 4 *Nev. & M.* 368. If the notes cannot be had within the time limited for making the motion,

the court upon application will enlarge the time. *Thomas v. Edwards*, 1 Cr. M. & R. 382. And where the cause was tried on the last day but one of the term, and the motion was made on the last day of term, before there was time to obtain the undersheriff's notes, but it was stated that they would be produced at the time of showing cause: the court, understanding that the counsel who made the motion had been the counsel at the trial, consented to hear the motion on his statement. *Barnett v. Glossop*, 3 Dowl. 625. *Flower v. Adams*, 8 Dowl. 292, and see *Reynolds v. Stone*, 1 Dowl. N. C. 578. These notes need not be signed by the undersheriff. *Ellis v. Mason*, 8 Law J., 196, *qb*. If the rule be moved for, on any objection to the pleadings, there is no necessity to have the pleadings verified by affidavit. *Milligan v. Thomas*, 4 Dowl. 373. If the rule be granted, and either party make out that it is a proper case to be tried before a judge of one of the superior courts, this may be made part of the rule; there is no necessity for a separate application for that purpose. *Moggeridge v. Drew*, 9 Dowl. 1042. If the rule nisi be granted on production of the undersheriff's notes, verified by affidavit, the other party, in showing cause against it, must obtain an office copy, not only of the affidavit, but of the notes also. *Walker v. Needham*, 1 Dowl. N. C. 220.

Motion.] Where the cause has been tried at the assizes, or in London or Middlesex in vacation, the motion must be made within the first four days of term, Sunday not included. And the same, where a writ of trial has been executed in vacation. *Williams v. Andrews*, 9 Dowl. 122. But if the cause have been tried in term, the motion may be made at any time within four days inclusive, (*Chapman v. Eley*, 11 Law J., 320, *cp.*) after the *distringas* or *habeas corpora* is returnable, although more than four days may have elapsed since the trial; and this is the practice now in all the courts. *Kirkham v. Marter*, 2 B. & A. 613. *Mason v. Clarke*, 1 Dowl. 288. *Ames v. Lettice*, 6 Mees. & W. 216. *Perkins v. Vaughan*, 1 Dowl. N. C. 700. *Carpenter v. Lee*, *Id.* 706. Where the motion was made on the fourth day and granted, but by mistake it was made in the court of King's Bench instead of the Exchequer; on the next day the error was perceived and the motion again made in the Exchequer: the court under the circumstances granted it. *Piggott v. Kemp*, 2 Dowl. 20. But in no other case will the court relax the rule here mentioned. *Lanyon v. Kelly*, 8 Law J., 40, *qb*. It often happens that there are more motions for new trials, particularly in the terms next after the circuits, than can be heard within the first four days of term; in which case, those which cannot be heard within that time, are set down in a list, to be heard on the next and following days, and the party moving must in that case give notice of the fact

to the other side, in order to prevent his signing judgment; for without such notice, a judgment signed on the 5th day, and before the motion has been made, would be regular. *Doe v. Edwards*, 7 Dowl. 547. *Lester v. Lazarus*, 4 Dowl. 444. It may be necessary to mention, that a new trial cannot be moved for, even within the four days, if a motion have previously been made in arrest of judgment, and have failed; for by moving in arrest of judgment, the party affirms the verdict. *Philpot v. Page*, 4 B. & C. 160. But in cases where the judge at the trial grants speedy execution, see 1 W. 4, c. 7, s. 2, or where the undersheriff upon a writ of trial refuses to grant a stay of execution, *Angel v. Iler*, 7 Dowl. 846, the issuing or levying of execution does not affect the party's right to move afterwards for a new trial, provided he do so within the time above mentioned.

The application must be made to the court in which the record was made up; even although the action could not have been maintained without the aid of the lord chancellor's order. *Carstairs v. Stein*, 4 M. & S. 192. But where an issue has been directed by a court of equity, any motion for a new trial of it, must be made, not to the court where it was tried, but to the court of equity which directed the issue, although the point relate merely to the admissibility of evidence, *Bowker v. Nixon*, 6 Taunt. 444, or although the judge at *nisi prius* have reserved certain points of law for consideration, *Stone v. Marsh*, 8 D. & R. 71, in which latter case it will be for the court of equity to say, whether they will direct a special case to be framed, for the opinion of the court of law on the points reserved. *Id.* A motion for a new trial of a cause, where the record has been made up in the Common Pleas at Lancaster, must be made to the court at Westminster, in which the judge sits who presided at the trial. *Foster v. Jolly*, 1 Cr. M. & R. 703.

Rule.] The rule is a rule *nisi*; the opposite party cannot, as a matter of right, insist upon showing cause in the first instance, even although he have given notice to that effect to the party moving. *Doe v. Smith*, 8 Ad. & El. 255. In cases tried before a judge at *nisi prius*, or before the court at bar, the application is usually made merely from the notes of counsel; and if at *nisi prius*, the court, if they wish to see the notes of the judge, will not grant the rule until after they have seen them. Sometimes the new trial is moved for, on affidavit, on some ground that will not appear from the judge's notes; and if the affidavit be of facts adding to or explanatory of the case made out at the trial, the rule in that case is generally granted on payment of costs. The affidavit also in the Queen's Bench must be sworn, before the time for moving for the new trial has expired, namely, before the fourth day of the term, where the cause was tried in the vacation, or the fourth day

after the return of the *distringas*, &c., where the cause is in term. *R. T. 5 G. 4, B. R.* The court, however, very rarely receive the affidavit of a witness who was examined at the trial. *Phillips v. Hatfield*, 10 *Law J.*, 33, *ex.* And they will not receive the affidavit of a juror, impugning the verdict for an error of law. *R. v. Woolter*, 6 *M. & S.* 366; nor will they receive the affidavit of others, as to the admissions of jurymen to that effect. *Jewel*, 2 *W. Bl.* 1299. *Davis v. Taylor*, 2 *Chit.* 268. *v. Stevenson*, 2 *W. Bl.* 803. Even where, in consequence of the affirmative of the issue being upon the defendant, beginning, the jury by mistake gave a verdict for the defendant, though they intended to give it for the plaintiff: the court refused a new trial, as the mistake could not be substantiated by the affidavits or admissions of the jurymen. *Wood v. Wynn*, 1 *Har. & W.* 574. The rule how applies only to what takes place between the jurors in the jury room, or the like, and not as to matters which took place openly in the public court, in respect of which the affidavit of a juror may be received in the same manner as the affidavit of any other person. *See ante*, p. 6. After the rule is granted, the court will not amend it; *Lopez v. De Taunt*, 712; nor will they allow another rule to be made on another point, omitted on the first motion, to come on at the same time. *Robertson v. Barker*, 2 *Dowl.* 39. If the rule is not granted, draw it up, and serve it in the ordinary manner. It may be necessary to mention that the rule may be made by a different attorney from the one who was engaged to move for the party, without any rule to change the attorney. *Doe v. Bransom*, 6 *Dowl.* 490.

The case will afterwards be called on in its order for a new trial paper. The judge's notes will then be read by the judge himself, if he be upon the bench, or if not, then by the junior puisne judge. *See Major v. Oxenham*, 5 *Tar.* 106. And these notes are conclusive, as to the evidence, & the court will not allow them to be contradicted, even by an affidavit. *R. v. Grant*, 3 *Nev. & M.* 106.

In granting a new trial, the court may annex to the order such terms as they think fit. Where at the first trial, the evidence under the general issue was reduced to a single point, the court, in granting a new trial on the ground that the verdict was against evidence, confined the parties to the point investigated at the first trial. *Thwaites v. Sain*, 437. But where the jury calculated the damages on an erroneous principle, giving the whole value of a house as damages in trespass for breaking and entering it, &c., the court held that, as the plaintiff was entitled of right to a new trial, the court could not limit the second inquiry to the damages only. *Mahoney v. Frasier*, 1 *Cr. & M.* 325. In general, where a new trial is moved for, on the ground

direction with respect to one of several issues, it has the effect of opening the whole record. *Earl of Macclesfield v. Bradley*, 7 *Mees. & W.* 570. Where one of the witnesses for the successful party at the first trial was very old, it was made one of the terms of granting a new trial, that in case he could not attend at the second trial, his evidence might be read from the judge's notes. *Anon.* 2 *Chit.* 425. And where the plaintiff died after verdict, the court in granting the defendant a new trial, imposed such terms as prevented him from taking advantage of the plaintiff's death. *Griffith v. Williams*, 1 *Crompt. & J.* 47. Where the action was brought by a bankrupt for the benefit of his assignees, the court refused to grant the plaintiff a new trial, unless the assignees would undertake to abide by the second verdict, and become responsible for the costs. *Noble v. Adams*, 7 *Taunt.* 59. Where a new trial is moved for by a defendant, the court sometimes make it one of the terms of their granting it, that the defendant shall bring the amount of the first verdict into court; in such a case, the money must be brought into court before the rule nisi is drawn up, otherwise the court will discharge it. *Clare v. Fietel*, 2 *Dowl.* 617. But where the judge at the first trial made an order for speedy execution, and the defendant at once paid the money and afterwards moved for a new trial, the court refused to order the plaintiff to pay into court the sum he had so received, pending the rule. *Morton v. Burn*, 5 *Dowl.* 421.

If after the new trial is granted, the plaintiff do not proceed to trial, there is no mode of compelling him to do so; but the defendant, if he will, may take the case down to trial by proviso, or, if the rule were granted to either party upon payment of costs, and he have not paid them, the other party may move to discharge it. *Earl of Harborough v. Shardlow*, 2 *Mees. & W.* 265.

Costs.] "If a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed in the second"; *R. G. H.* 2 *W.* 4, s. 64. and see *Peacock v. Harris*, 1 *Nev. & P.* 240. *Newberry v. Colvin*, 2 *Dowl.* 415. *Wilkinson v. Malin*, 2 *Dowl.* 65. *Thomas v. Hawkes*, 9 *Mees. & W.* 53, 11 *Law J.*, 54, *ex.*, but see *Bower v. Hill*, 5 *Dowl.* 183; and never to the party who was unsuccessful at the first trial. And where a verdict for a defendant was set aside and a new trial granted, and the parties then referred the cause, the costs to be in the discretion of the arbitrator, and he awarded in favour of the plaintiff, and ordered the defendant to pay the costs of the cause: the court held that the plaintiff was not entitled to the costs of the first trial. *Rigby v. Okell*, 7 *B. & C.* 57, see *Payne v. Bailey*, 3 *Brod. & B.* 304.

Where the court reserve the question of costs, until after the second trial, it will then be entirely in their discretion whether they will allow the costs of the first trial, to the party who succeeds at the second or not. Where there were three verdicts, the first for the plaintiff, the second for the defendant by reason of a misdirection, the third for the defendant upon the merits, and the rule for the first new trial reserved the consideration of costs: the court allowed the defendant to take the costs of the first or second trial, at his option, and the costs of the last. *Body v. Esdaile*, 3 Bing. 174.

If when a new trial is granted, the costs be ordered to abide the event, if the same party succeed at both trials, he shall have the costs of both; if a different party, then he shall have the costs of the second trial only. *Sherlock v. Barned*, 8 Bing. 21. *Canham v. Fisk*, 2 Tyr. 155. *Meale v. Goddard*, 5 B. & A. 766. *Chapman v. Partridge*, 2 New Rep. 382. *Brown v. Boyn*, 5 Moore, 309. *Austen v. Gibbs*, 8 T. R. 619. And where the defendant obtained a rule to set aside a verdict for plaintiff, the costs to abide the event, and the plaintiff then discontinued the action, it was holden that the defendant was not entitled to the costs of the trial. *Howarth v. Samuel*, 1 B. & A. 566. *Joliffe v. Mundy*, 8 Law J., 100, *ex*. But where a plaintiff in an action on a policy of insurance, obtained a rule to set aside his own verdict, because it was for an average loss only, and the costs were to abide the event; and at the second trial, he again recovered as for an average loss only: the court granted him the costs of the second trial only. *Hudson v. Majoribanks*, 1 Bing. 393.

The court sometimes grant the new trial without costs: as where the jury perversely find against law, and against the direction of the judge; *Farrant v. Olmins*, 3 B. & A. 692; or where the plaintiff submits to an erroneous nonsuit; *Porlain v. Panley*, 1 W. Bl. 670. *Bunsell v. Hogg*, 3 Wils. 146; or where the new trial is for misdirection, or the like: in such a case, the costs of the first trial will not be given, whatever may be the event of the second, except under particular circumstances. *Lord v. Wardle*, 3 Bing. N. C. 680.

The court often grant a new trial upon payment of costs: as where the verdict was against evidence, *Doe v. Pike*, 1 Nev. & M. 385, the jury having acted from error merely, and not perversely; *Shillitoe v. Claridge*, 2 Chit. 425; or where the new trial is granted on the ground of surprise; *Greatwood v. Sims*, 2 Chit. 269; or on a ground not opened at the trial. *Sutton v. Mitchell*, 1 T. R. 20. These costs, in town causes, include the costs occasioned by the cause being made a remanet, *Robinson v. Day*, 5 B. & Ad. 814, but not any other costs which are properly deemed costs in the cause, but merely the costs of the trial. *Lord v. Wardle*, 6 Dowd. 174. If in such a case, a time be limited in the rule for the payment of the costs, and the costs

be not paid within such time, the court, upon application, will grant a rule absolute in the first instance to discharge that rule. *Champion v. Griffiths*, 1 Dowl. N. C. 319. When the first verdict is erroneous, owing to the misconduct of the attorney of either party, the court, in granting a new trial, sometimes order the attorney to pay the costs. See *Trubody v. Brain*, 9 Price, 76.

Where the plaintiff had a verdict, which was afterwards set aside, and a new trial granted without mention of costs, but the defendant, instead of proceeding to the second trial, gave the plaintiff a cognovit: the court held that the plaintiff was entitled to the costs of the first trial. *Booth v. Atherton*, 6 T. R. 144. *Jackson v. Hallam*, 2 B. & A. 317. But in another case, where the execution of a writ of inquiry was set aside, without mention of costs, and the defendant, in order to avoid expense, immediately paid the plaintiff the sum found by the former inquest: the court held that the plaintiff was not entitled to the costs of the inquiry. *Porter v. Cooper*, 2 Cr. M. & R. 232. So, where the plaintiff was nonsuit, and the nonsuit was set aside and a new trial granted; and the defendant then, instead of proceeding to the second trial, gave the plaintiff a cognovit for one shilling damages, with such costs as the prothonotary should think fit: the prothonotary having refused the plaintiff the costs of the first trial, the court refused to direct him to review his taxation. *Elvin v. Drummond*, 4 Bing. 415. So, where the court set aside a verdict for plaintiff, and granted a new trial, without mention of costs; and the plaintiff then applied to amend his declaration, which was granted, upon payment of the costs of the former trial; but the plaintiff, not wishing to pay these costs, discontinued the action: the court held that the defendant was not entitled to the costs of the first trial. *Gray v. Cox*, 5 B. & C. 458. *Ld. Macclesfield v. Bradley*, 10 Law J., 182, ex., 7 Mees. & W. 570.

Where a party was entitled to the costs of the second trial only, and the master, in taxing costs, allowed him for fees to counsel, more than was actually paid at the second trial, the court held that the master was right in not confining himself to the fees given on the second trial, but that he might allow a reasonable sum for these fees, not exceeding the sums marked on the first briefs. *Wilkinson v. Malin*, 2 Dowl. 65.

SECTION II.

Venire de novo.

In what cases.] Where there is an imperfect or defective finding by a jury, the court will award a *venire de novo*. See *Goodtitle v. Jones*, 7 T. R. 52. Thus, where in assumptionit,

case or trespass, issue is joined upon a plea in abatement, and the jury find for the plaintiff on the issue, but assess no damages, the court will award a *venire de novo*. *Euhorn v. Lemaitre*, 2 Wils. 367. So, in an action on a bond, conditioned for the performance of covenants, &c. within stat. 8 & 9 W. 3, c. 11, s. 8, (*see* vol. 1, p. 327), if the jury do not assess damages for the breaches, a court of error will award a *venire de novo*. *Hardy v. Bern*, 5 T. R. 540, 636. So, where the jury find a verdict for the plaintiff, and do not assess damages where they ought, if their finding be in the nature of a verdict, and not of an inquest, so that the omission cannot be remedied by a writ of inquiry, (*see* vol. 1, p. 309), a court of error would, it seems, award a *venire de novo*. So where there were several pleas, and the jury found a verdict upon one of them only, for the defendant, and that plea afterwards was found to be bad, a court of error awarded a *venire de novo*. *Hick v. Keats*, 6 D. & R. 68. And where a person not summoned on the jury, was sworn and served upon it, the irregularity being noticed before verdict, the court awarded a *venire de novo*. *Dovey v. Hobson*, 6 Taunt. 460. So, upon a bill of exceptions as to the admissibility of evidence, if the evidence be decided to have been inadmissible, the court of error will award a *venire de novo*. *Davies v. Pierce*, 2 T. R. 125. So, where some counts of a declaration are good and some bad, and a general verdict is given, the court, instead of arresting the judgment will award a *venire de novo*. *Ayrey et al. v. Fearnside et al.*, 4 Mees. & W. 168. *Lewin v. Edwards*, 1 Dowl. N. C. 639. *Chadwick v. Trower et al.*, 8 Law J., 286, *ex. See* *Holt v. Scholefield*, 6 T. R. 691, *semb. cont.*, unless there be a misjoinder of counts, in which case the court will not award a *venire de novo*, but will arrest the judgment. *Corner v. Shew*, 4 Mees. & W. 163. So, if there be several breaches in the one count, and some of them be bad, if a general verdict be given, the court will award a *venire de novo*. *Leach v. Thomas*, 2 Mees. & W. 427. And the like, by a court of error, if error be brought in such a case. *Dadd v. Crease*, 2 Cr. & M. 223. But a court of error cannot award a *venire de novo*, where the proceedings have originated in an inferior court. *Trevor v. Wall*, 1 T. R. 151. *Bishop v. Kaye*, 3 B. & A. 610.

Costs.] Where a *venire de novo* is awarded, the party ultimately succeeding is entitled only to the costs of the second trial, not of the first. *Lickbarrow v. Mason*, 6 T. R. 131, and *see* *Bird v. Appleton*, 1 East, 111. The court have no discretion in this case; they cannot award the costs of the first trial to either party, whatever may be the event of the second. *Edwards v. Brown*, 1 Crompt. & J. 354.

SECTION III.

Arrest of judgment.

For defects in substance, appearing plainly upon the face of the record, (*see Frame et al. v. White et al.*, 9 *Law J.*, 337, *cp.*) not amendable, nor cured by verdict, the court will in general arrest the judgment. And where separate damages are assessed in each count of the declaration, if one of the counts be bad, the judgment shall be arrested on that count only. *Hayter v. Most*, 2 *Mees. & W.* 56. But when the damages have been assessed on all the counts jointly, we have seen (*ante* p. 22) that the court will not arrest the judgment, but will grant a *renire de novo*, except in the case of a misjoinder of counts. So, after argument on demurrer, the party will not be allowed to move in arrest of the judgment on the demurrer, for an objection of which he might have availed himself on the argument on the demurrer. *Creswell v. Packham*, 5 *Taunt.* 630.

This motion in arrest of judgment shall not be allowed "after the expiration of four days from the time of trial, if there are so many days in term, nor in any case after the expiration of the term, provided the jury process be returnable in the same term." *R. G. H.* 2 *W.* 4, s. 65. *See Brook v. Finch et al.*, 6 *Dowl.* 313. If the trial be in vacation, the motion must be made within the four first days of the next term. *Weston v. Foster*, 2 *Bing. N. C.* 701. *Thomas v. Jones.* 4 *Mees. & W.* 28.

SECTION IV.

Judgment.

1. *Judgment in ordinary cases*, p. 23.
2. *Statutory judgments*, p. 30.

1. *Judgment in ordinary cases.*

The judgment we mean to treat of here, is the judgment after verdict or nonsuit. As to judgment by default, *see* vol. 1, p. 304; judgment on demurrer, vol. 1, p. 323; judgment on cognovit, vol. 1, p. 339; judgment after a writ of inquiry, vol. 1, p. 313; judgment in error, *post*, *tit.* "Error;" judgment of *nonpros*, *see* vol. 1, p. 228; judgment upon *nul tiel record*, vol. 1, p. 296; judgment of outlawry, vol. 1, p. 122; judgment in replevin, *post*, *title*, "*Replevin*;" judgment in *scire facias*, *post*, *title*, "*Scire facias*;" judgment upon plea in abatement, vol. 1, p. 301.

The judgment is the conclusion of law, upon the premises stated previously upon the record. It must be signed in all cases; otherwise no execution upon it can regularly be sued out. *Finch v. Brook*, 5 Dowl. 59. A feigned issue from a court of equity, is the only exception to this; in that case, it is not usual in practice to sign judgment. As to the forms of the different judgments, see *R. G. H. 4 W. 4, r. 2, sch. 3 & 8, and in the Appendix.*

When and how signed.] No rule for judgment is now required, in any of the courts: by *R. G. 2 W. 4, s. 67*, after a verdict or nonsuit, judgment may be signed "on the day after the appearance day of the return of the *distringas* or *habeas corpora*, without any rule for judgment;" and where the judge at the trial grants speedy execution, (*see vol. 1, p. 308*), judgment may be entered up forthwith, according to the terms of the judge's certificate for that purpose, (without giving any rule for judgment, *R. G. T. 4 Vict.*) although the *distringas*, &c. be not then returnable; *1 W. 4, c. 7, s. 2*; but the court may afterwards set aside or arrest the judgment, or award a new trial, as justice may appear to require. *Id. s. 4*. Where a plaintiff signed his judgment on the evening of the fourth day, and sued out execution, the court set it aside with costs. *Blanchenay v. Van den Burgh*, 1 Brod. & B. 298.

Get the record of nisi prius from the associate; and if the postea be not indorsed, engross it on the back of it; see the forms in the Appendix. Then take it, together with an affidavit of increased costs, to the master, who will tax the costs and sign judgment. As to the taxation of costs, see *post*. Until the costs are taxed, the judgment is not deemed complete. *Butler v. Bulkeley*, 1 Bing. 233. *Salter v. Slade*, 3 Nev. & M. 724, 717, per Taunton, J.

Interest on judgment.] Every judgment shall carry interest at the rate of 4 per cent. per annum, from the time of entering the judgment, or from the 1st October, 1838, in cases of judgments then entered up and not carrying interest, until the same shall be satisfied; and such interest may be levied under a writ of execution on such judgment. *1 & 2 Vict. c. 110, s. 17*. The entering of the judgment, here mentioned as the time from which the interest shall be computed, means the time of taxing the costs and of the master's signing the *allocatur* for the amount; and in a recent case in the court of Common Pleas, where judgment was signed, that is, an incipitur of it entered in the master's book, on the 8th of January, and the costs were then taxed, but owing to a motion to review the taxation, such taxation was not completed until the 30th May: the court held the plaintiff entitled to interest from the 8th January. *Fisher v. Dudding*, 9 Dowl. 872.

When and how entered, &c.] Formerly the attornies were in strictness obliged to make all their entries, and carry in their rolls, before the term next following that of which they are made up, being required by several old rules of court to do so. But this was not observed in practice. And now, by R. G. H. 4, W. 4, s. 15, the entry of proceedings on the record for trial, or on the judgment roll, according to the nature of the case, shall be taken to be, and shall be in fact, the first entry of proceedings in the cause, or of any part thereof, upon record; and no fees shall be payable in respect of any prior entry made or supposed to be made on any roll or record whatever. It is necessary, however, that they should do so, before they bring debt or *scire facias* upon their judgment, or debt or *scire facias* against the defendant's bail, and also in case of a writ of error being brought.

The issue is entered on the roll, as directed vol. 1, p. 326. The subsequent proceedings, to the judgment inclusive, are then entered on the roll, by the proper officer at the master's office; see the form R. G. H. 4 W. 4, r, 2, Sch. No. 3, 8; and see the *Appendix*.

When and how registered.] Formerly, by stat. 4 & 5 W. & M. c. 20, s. 3, a judgment must have been docketted, to affect lands as against subsequent purchasers or mortgagees, or to have any preference against heirs, executors or administrators, in their administration of the ancestor's, testator's or intestate's estates. See *Gaunt et al. v. Taylor et al.*, 11 Law J., 68, cp.

Afterwards, by stat. 1 & 2 Vict. c. 110, s. 19, no judgment of any of the superior courts, shall by virtue of this act affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until a memorandum or minute, containing the name, and the usual or last known place of abode, and the title, trade or profession of the person whose estate is intended to be affected thereby, and the court and title of the cause in which such judgment shall have been obtained, and the date of such judgment and the amount of the debt, damages or costs thereby recovered,—shall be left with the senior master of the court of Common Pleas at Westminster, who shall enter the same in a book, in alphabetical order, by the name of the person to be affected by such judgment, for which he shall be entitled to a fee of five shillings; and all persons shall be at liberty to search such book, on payment of the sum of one shilling. And by stat. 2 & 3 Vict. c. 11, s. 3, such master shall insert in such book, the year and the day of the month when every such memorandum or minute is so left with him.

Now, however, the docketting of the judgment under the
VOL. II.

stat. 4 & 5 W. & M. is abolished, by stat. 2 & 3 Vict. s. 1; and no judgment already docketted under stat. 4 & 5 W. & M. shall, after the 1st August, 1841, affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until such memorandum or minute prescribed by the above stat. 1 & 2 Vict. c. 110, s. 19, shall be left with the senior master of the court of Common Pleas at Westminster, who shall forthwith enter the same, and shall be entitled for such entry to the fee of five shillings.

And all judgments of any of the superior courts, decrees or orders of any court of equity, rules of a court of common law, and orders in bankruptcy or lunacy, which since the passing of the said stat. 1 & 2 Vict. c. 110, have been registered in pursuance of the provisions therein contained, or which shall be hereafter so registered, shall, after the expiration of five years from the date of the entry thereof, be null and void against lands, tenements and other hereditaments, as to purchasers, mortgagees and creditors, unless a like memorandum or minute as is required in the first instance is again left with the senior master of the said court of Common Pleas within five years next before the execution of the conveyance, settlement, mortgage, lease or other deed or instrument vesting or transferring any legal or equitable right, title, estate or interest in or to such purchaser or mortgagee for valuable consideration to creditors, within five years before the right of such creditors accrued, and so toties quoties, at the expiration of every succeeding five years; and the senior master shall forthwith enter the same, in like manner as the same was originally entered; and such officer shall be entitled to a fee of five shillings for such re-entry. 2 & 3 Vict. c. 11, s. 4.

But, as against purchasers and mortgagees without notice of any such judgment, decrees or orders, rules or orders as aforesaid, it is provided that none of such judgments, decrees, orders, rules or orders shall bind or affect any lands, tenements or hereditaments, or any interest therein, further or otherwise than a judgment of one of the superior courts aforesaid shall have bound any purchaser or mortgagee before the said stat. 1 & 2 Vict. c. 110, where it had been duly docketted according to the law then in force. *Id.* s. 5.

Nothing, however, in either of the acts shall extend to affect or prejudice any judgment as between the parties thereto or their representatives, or those deriving as volunteers from them." *Id.* s. 6.

Doubts being entertained, whether notice of such a judgment, &c., to a purchaser, mortgagee or creditor, would affect him in equity, although it were not registered as mentioned, it is declared and enacted by stat. 3 & 4 Vict. c. 2, that it shall not.

Besides the above registry of judgments, there is a registry established in Middlesex and Yorkshire by several statutes, (5 Anne c. 18, s. 4. 6 Id. c. 35, s. 19. 7 Id. c. 20, s. 18. 8 G. 2, c. 6, ss. 1, 18), which requires a memorial of every judgment to be filed at the register office of these counties respectively, before it shall bind lands there. But these acts seem to be superseded in a great measure by the general registry above established.

Lien of judgments, on lands, &c.] "A judgment entered up, or to be hereafter entered up against any person in any of Her Majesty's superior courts of Westminster, shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents and hereditaments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall at the time of entering up such judgment or at any time afterwards, be seized, possessed or entitled, for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder or expectancy, or over which such person shall, at the time of entering up such judgment or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit; and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments." 1 & 2 Vict. c. 110, s. 13.

Also, "every judgment creditor shall have such and the same remedies in a court of equity, against the hereditaments so charged by virtue of this act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon: provided that no judgment creditor shall be entitled to proceed in equity, to obtain the benefit of such charge, until after the expiration of one year from the time of entering up such judgment, or, in cases of judgments already entered up or to be entered up before the time appointed for the commencement of this act, until after the expiration of one year from the time appointed for the commencement of this act. *Id.* But "nothing herein contained shall be deemed or taken to alter or affect any doctrine of courts of equity, whereby protection is given to purchasers for valuable consideration, without notice." *Id.*

It is provided, however, that such charge shall not "operate

to give the judgment creditor any preference, in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy." *Id.*

It is provided also, that as regards purchasers, mortgagees or creditors, prior to the 1st October, 1838, such judgment shall not affect lands, &c., otherwise than it would have done, if the act had not passed. *Id.* s. 13. And even as against purchasers, mortgagees and creditors after that time, as well as before, such judgment shall not affect lands, &c., unless registered in the manner hereinbefore mentioned. *Id.* s. 19.

Lien of judgments on government or other stocks.] "If any person, against whom any judgment shall have been entered up in any of Her Majesty's superior courts at Westminster, shall have any government stocks, funds or annuities, or any stock or shares of or in any public company in England, (whether incorporated or not) standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities or shares, or such of them, or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall be so recovered and interest thereon; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to, if such charge had been made in his favour by the judgment debtor: provided that no proceedings shall be taken to have the benefit of such charge, until after the expiration of six calendar months from the date of such order." 1 & 2 Vict. c. 110, s. 14. The court have no authority in this case, in the first instance; the application must be made to a judge at chambers. *Brown v. Bamford*, 9 Mees. & W. 42.

In order to prevent any transfer of such stock, the judge's order shall in the first instance be made *ex parte*, without any notice to the judgment debtor, and shall be an order to show cause only; and in the case of government stock, &c., the order shall restrain the governor and company of the Bank of England from permitting a transfer in the mean time, and until such order shall be made absolute or discharged; and in the case of stock of a public company, the order shall in like manner restrain such public company from permitting a transfer thereof: and "if after notice of such order to the person or persons to be restrained thereby, or, in case of corporations, to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made," then such corporation or person shall be liable to the judgment creditor for the value or amount of the

stock transferred, or so much thereof as shall be sufficient to satisfy his judgment; and no disposition by the debtor shall in the mean time be valid as against the judgment creditor.
Id. s. 15.

And "unless the judgment debtor shall, within a time to be mentioned in such order, show to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney, or agent, be made absolute: provided that any such judge shall, upon the application of the judgment debtor or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit." *Id.*

It is provided however, that, "if any judgment creditor, who under the powers of this act shall have obtained any charge, or be entitled to the benefit of any security whatsoever, shall afterwards, and before the property so charged or secured shall have been converted into money and realized, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment," he shall be deemed to have relinquished all title to the benefit of such charge or security.
Id. s. 16.

It being doubted whether these sections extended to the cases hereinafter mentioned, it was enacted by stat. 3 & 4 Vict. c. 82, s. 1, (after reciting the 14th section of stat. 1 & 2 Vict. c. 110, above mentioned), that the provisions of the said act should extend to the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities or shares as aforesaid, as also in the dividends, interest or annual produce of any such stock, funds, annuities or shares; and whenever any such judgment debtor shall have any estate, right, title or interest, vested or contingent, in possession, remainder or reversion, in, to or out of any such stocks, funds, or annuities or shares as aforesaid, which now are or shall hereafter be standing in the name of the accountant-general of the court of Chancery, or the accountant-general of the court of Exchequer, or in, to or out of the dividends, interest or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities or shares, or the interest, dividends or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor:—provided always that no order of any judge as to any stock, funds, annuities or shares standing in the name of the accountant-general of the court of Chancery or the accountant-general of the court of Exchequer, or as to the interest, dividends or annual produce thereof, shall prevent the governor and company of the Bank of

England, or any public company, from permitting any transfer of such stock, funds, annuities or shares, or payment of the interest, dividends or any produce thereof, in such manner as the court of Chancery or the court of Exchequer respectively may direct, or shall have greater effect than if such debtor had charged such stock, funds, annuities or shares, or the interest, dividends or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in such order. See *Robinson v. Peace*, 7 Dowl. 93.

Relation of judgments.] By R. G. H. 4 W. 4, r. 2, s. 3, "all judgments, whether interlocutory or final, shall be entered of record, of the day of the month and year (whether in term or vacation) when signed, and shall not have relation to any other day; provided that it shall be competent for the court or a judge to order judgment to be entered *nunc pro tunc*." Formerly the court would allow a judgment to be entered of a previous term, *nunc pro tunc*, where the party was delayed by the act of the court; per Buller, J., 1 T. R. 637. *Evans v. Rees*, 12 Ad. & El. 167; but not where he was delayed by a proceeding in the common course of law, as by a writ of error, or the like, *Bates v. Lockwood*, 1 T. R. 637. See *Mara v. Quin*, 6 T. R. 1. *Copley v. Day*, 4 Taunt. 702, or in case of death. *Lambirth v. Barrington*, 2 Bing. N. C. 149. *Vaughan v. Wilson*, 4 Id. 116. And the same is still the practice under the above rule. *Lauman v. Ld. Audley*, 2 Mees. & W. 535. *Evans v. Rees*, *supra*. Nor has a judgment now, any artificial relation to the first day of the term, as formerly. See vol. 1, p. 409.

The judgment binds the lands of a defendant, 2 Saund. 69, *note*, not only those of which he is actually seised, but also those of which others are seised in trust for him; 29 C. 2, c. 3, s. 10; but as against purchasers and mortgagees, it binds the lands only from the time it is registered. *Supra*. The chattel property is bound, not by the judgment, but by the delivery of the writ of execution to the sheriff. 29 C. 2, c. 3, s. 16. See *Brackenbury v. Laurie*, 3 Dowl. 180.

As to the revival of judgments, see *post*, title, "*scire facias*."

2. Statutory judgments.

Decrees, rules, orders, &c.

When to be treated as judgments.] "All decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the lord chancellor or of the court of Review in matters of bankruptcy, and all orders of the lord chancellor in matters of lunacy, whereby any sum of money, or any costs,

charges or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law; and the persons to whom any such monies, or costs, charges or expenses shall be payable, shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts, shall and may be exercised by courts of equity with respect to matters therein depending, and by the lord chancellor and court of Review in matters of bankruptcy, and by the lord chancellor in matters of lunacy; and all remedies hereby given to judgment creditors, are in like manner given to persons to whom any monies, or costs, charges or expenses, are by such orders or rules respectively directed to be paid." 1 & 2 Vict. c. 110, s. 18. It has been holden that an order of the court of Chancery for the payment of money into the bank, with the privity of the accountant-general, to the credit of a cause depending in that court, is not an order within the meaning of this section. *Gibbs v. Pike et al.*, 10 Law J., 309, ex., 1 Dougl. N. C. 409.

To be registered.] These decrees, orders, rules, &c., must be registered in the same manner precisely as judgments, otherwise they shall not affect lands, tenements, or hereditaments, as to purchasers, mortgagees or creditors. *Id.* s. 19. See *ante*, p. 25.

Execution thereon.] "Such new or altered writs shall be sued out of the courts of law, equity and bankruptcy, as may by such courts respectively be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the judges of such courts respectively shall from time to time think fit to order, and the execution of such writs shall be enforced in such and the same manner, as the execution of writs of execution is now enforced, or as near thereto as the circumstances of the cases will admit. *Id.* s. 20. See the forms in the Appendix.

Judgments, &c. of inferior courts.

How and in what cases removed.] In all cases where final judgment shall be obtained in any action or suit in any inferior court of record, in which at the time of the passing of this act a barrister of not less than seven years' standing shall act as judge, assessor or assistant in the trial of causes,—and also in all cases where any rule or order shall be made by any such inferior court of record as aforesaid, whereby any sum of money or any costs, charges or expenses, shall be payable to any per-

son,—it shall be lawful for the judges of any of Her Majesty's superior courts of record at Westminster, or, if such inferior court be within the county Palatine of Lancaster, for the judges of the court of Common Pleas at Lancaster, or for any judge of any of the said courts at chambers, either in term or vacation, upon application, to order and direct the judgment, or rule or order, of such inferior court, to be removed into the said superior court, or into the court of Common Pleas at Lancaster, as the case may be. 1 & 2 Vict. c. 110, s. 22. See *Harvey v. Gilbard*, 7 Dowl. 616. As to the proceeding by *certiorari* to remove judgments of inferior courts into any of the courts of common law at Westminster, for the purpose of suing out execution, see vol. 1, p. 219.

Application and order.] This order may be made "upon the application of any person, who at the time of the commencement of this act shall have recovered, or who shall at any time thereafter recover such judgment, or to whom any money or costs, charges or expenses shall be payable by such rule or order as aforesaid, or upon the application of any person on his behalf, and upon the production of the record of such judgment, or upon the production of such rule or order, such record, or rule or order, as the case may be, being respectively under the seal of the inferior court and signature of the proper officer thereof." *Id.*

It is seemingly a mistake in the statute, thus to require the production of the record of the judgment, upon an application to remove it; for it cannot be produced, until after it has been removed, unless indeed we are to suppose that the officer of the court will be guilty of such a breach of duty as to take the record from its proper place of deposit, for the purpose of such an application, without any command or authority of the superior court, to warrant him in doing so. This may probably render this section inoperative as far as respects judgments. As to the rules and orders of such a court, although it may seem absurd to require their production upon an application to remove them, yet it appears to be practicable; because these rules and orders are delivered out to the parties, and every copy made out from the minutes in the court books, by the officer of the court, are deemed originals.

Effect of the removal.] Immediately upon such judgment rule or order being removed, it shall be "of the same force, charge and effect as a judgment recovered in, or a rule or order made by, such superior court; and all proceedings shall and may be immediately had and taken thereupon or by reason or in consequence thereof, as if such judgment so recovered, or rule or order so made, had been originally recovered in or made by the said superior court;" and all the reasonable costs and

charges attendant upon such application and removal, shall be recovered in like manner as if the same were part of such judgment or rule or order. *Id.* s. 22.

But as to purchasers, mortgagees and creditors, no such judgment, rule or order shall affect any lands, tenements or hereditaments, any further than they would if not removed, "unless and until a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same." *Id.*

SECTION V.

Judgment non obstante verdicto.

If the plea or pleas pleaded be no answer to the action, and a verdict be thereupon found for the defendant, the court will award the plaintiff judgment *non obstante verdicto*. And where a defendant pleaded a defence under a particular statute, but after plea and before trial the statute was repealed, and another enacted in its stead which did not afford the same defence, the plaintiff was holden entitled to judgment *non obstante verdicto*. *Warne v. Bereaford*, 2 *Mees. & W.* 848. But the court will not do so, where the plea, however bad upon demurrer, is good after verdict. *Easton v. Pratchett*, 3 *Dowl.* 472, and see *Eduards v. Price et al.*, 6 *Dowl.* 487. *Negelen v. Mitchell*, 1 *Dowl. N. C.* 110. Nor will they do so, where the cause has been referred to arbitration, and the arbitrator has made his award. *Steeple v. Bonsall*, 2 *Har. & W.* 11. Where there was a verdict for plaintiff, and the defendant moved for judgment *non obstante verdicto*, for the insufficiency of the replication, the court said there was no instance of such a motion upon the part of a defendant. *Rand v. Vaughan*, 1 *Hodg.* 173.

By R. G. H. 2 W. 4, s. 65, no motion for judgment *non obstante verdicto* shall be allowed, "after the expiration of four days from the time of trial, if there are so many days in term, nor in any case after the expiration of the term, provided the jury process be returnable in the same term." See *Weston v. Foster*, 2 *Hodg.* 63. *Thomas v. Jones*, 6 *Dowl.* 663.

If the verdict be general for the defendant, and the plaintiff have judgment *non obstante verdicto* as to all of the pleas pleaded, he may afterwards sue out a writ of inquiry to assess his damages. *Shephard v. Halls*, 2 *Dowl.* 453. But if some of the pleas be good, the defendant will be entitled to retain his judgment as to them; and no writ of inquiry can issue: for if they go to the whole cause of action, the plaintiff will not be entitled to damages; and if they go to a part only, a *venire de novo* must be awarded. See *Id.* And where the jury gave a verdict for defendant on six special pleas, and for the

plaintiff on two special pleas and the general issue, but found no damages, and the plaintiff afterwards had judgment ~~non obstante veredicto~~ as to the six pleas found for the defendant: it was holden that the plaintiff could not execute a writ of inquiry, but that a venire de novo must issue. *Clement v. Leach*, 3 Brod. & B. 297.

Neither the plaintiff nor the defendant is entitled to costs upon the issues, as to which the plaintiff has judgment ~~non obstante veredicto~~, *Goodburne v. Bowman*, 2 Dowl. 206, nor to the costs of the motion.

SECTION VI.

Scire facias.

1. In what cases.

To revive a judgment.] A plaintiff in a personal action, if he have omitted to sue out execution within a year after judgment, cannot afterwards sue out a writ of execution, not even an elegit, *Putland v. Newman*, 6 M. & S. 179, without first reviving the judgment by scire facias, see *stat. Westm.* 2 (13 Edw. 1.) c. 45, unless the execution have been stayed by writ of error. 2 *Saund.* 72, e., or injunction, *Powis v. Powis*, 6 Moore, 517, or by express agreement between the parties, *Howell v. Strattan*, 2 Smith, 65, or unless the plaintiff have judgment with a *cesset executio*, until a certain day; *Hiscox v. Kemp*, 5 Nev. & M. 113, 3 Ad. & El. 676; in which cases he must sue out his execution within a year after the writ of error has been determined, or the injunction dissolved, &c.: otherwise a scire facias must be sued out to revive the judgment. But if execution be sued out within the year, any other writ of execution may afterwards be sued out, at any distance of time, without reviving the judgment, see *Scott v. Whalley*, 1 H. Bl. 297, provided such first writ be returned and filed. Or if the writ of execution be sued out within the year, it may be executed after the year has elapsed, without reviving the judgment by scire facias. *Simpson v. Heath*, 9 Law J., 129, ex. See *Collins v. Yewens*, 8 Id. 332, qb. Or if the defendant agree to waive the necessity of a scire facias, he cannot afterwards object to a writ of execution being sued out, without reviving the judgment; *Morris v. King*, 9 Law J., 320, qb.; and this, even although the agreement be by parol merely. *Morgan v. Burgess*, 1 Dowl. N. C. 850.

After death or marriage of parties.] In what cases a scire facias is necessary to revive a judgment upon the death of a party, see vol. 1, p. 408. *Goldsworthy v. Southcott*, 1 Wils.

243. 2 Saund. 6, n. 1. 72, i, k, l, m, n, o, p. And as to a *scire facias* against heir and terretenants, see 2 Saund. 7, n. 4. 51, n. 4.

In what cases it is necessary, after the marriage of a feme sole party, see vol. 1, p. 410. 2 Saund. 72, k, l.

Against bail.] As to the *scire facias* against bail, see vol. 1, p. 204. And as to its lying at the sheriff's office four clear days before the return day, see also vol. 1, p. 204. If there be any irregularity in this latter respect, the application should be, not to set aside the *sci. fa.*, but to set aside the proceedings. *Williams v. Brown*, 2 Dowl. 749.

In other cases.] As to *scire facias* in debt on bond conditional to perform covenants, or to pay money by instalments, &c., see vol. 1, p. 328. 1 Saund. 58, n. 1. 2 *Id.* 72, g. As to *scire facias* upon a judgment of assets in *future*, in actions against executors or administrators, see 1 Saund. 336, b. 2 *Id.* 219, n. 2; and as to the *scire fieri* inquiry in cases of *devastavit*, see *post*, tit. "Actions against executors." 1 Saund. 219, a., note 8. As to the *scire facias ad rehabendam terram*, see 2 Saund. 72, u., note 5, and *post*, tit. "Execution."

2. Writ, and proceedings thereon.

The writ.] A *scire facias* to revive a judgment, must be directed to the sheriff of the county in which the venue was laid. *Wharton v. Musgrave*, Cro. Jac. 331. MS. B. 2138. and see *Pickman v. Robson*, 1 B. & A. 486. 2 Saund. 72, q. A *scire facias* upon a recognizance of bail, &c., taken at Westminster, must be directed to the sheriff of Middlesex. Also by R. G. H. 2 W. 4, s. 80, "a *scire facias* upon a recognizance taken in Serjeants' Inn, or before a commissioner in the country and recorded at Westminster, shall be brought in Middlesex only; and the form of the recognizance shall not express where it was taken." See vol. 1, p. 204.

It must bear teste in term time. *Seaton v. Heap*, 5 Dowl. 247. In a *sci. fa.* against bail, it is not necessary that it should be tested on the return day of the *ca. sa.* against the principal, *Sandland v. Claridge*, 2 Dowl. 115, although it may be so tested. *Id.* It must also be returnable in term. If there be two writs, it is sufficient in all cases that there be fifteen days between the teste of the first and the return of the second, without regard to the number of days between the teste and return of each writ. *Combe v. Cutill*, 3 Bing. 162. If there be but one writ in the Common Pleas and Exchequer, there must be fifteen days between the teste and return; in the Queen's Bench formerly there were fifteen days

between the teste and return in actions by original, but ~~four~~ days were sufficient in actions by bill. *Bell v. Jackson*, 4 T. R. 663.

The writ must strictly pursue the judgment or other record, on which it is founded. *Mara v. Quin*, 6 T. R. 1. *Panton v. Hall*, 2 Salk. 598. But upon a recognizance of bail, which is joint and several, it may be against both the bail, or there may be a *sci. fa.* against each. 2 Saund. 72 b. And it must be returnable in that court in which the record, on which it is founded, is, or is supposed to be. 2 Saund. 72 f.

By R. G. H. 2 W. 4, s. 79, "a *scire facias* to revive a judgment more than ten years old, shall not be allowed, without a motion for that purpose in term, or a judge's order in vacation; nor if more than fifteen, without a rule to show cause." Otherwise, the court will set aside the proceedings. *Lowe v. Robins*, 1 Brod. & B. 381. And where it was sought to revive a judgment in ejectment which was twenty years old, and the delay in suing out execution was not accounted for, the court refused to grant a rule. *Doe v. Tricknell*, MS. B. 2137. The affidavit in such a case must be made either by the party himself, or by some person who was his attorney at the time of the judgment. *Duke of Norfolk v. Leicester*, 1 Mees. & W. 204. If it be a rule *nisi*, it must be served on all the defendants; *Panter v. Seaman*, 5 Nev. & M. 679; and they cannot object to any irregularity in the judgment in answer to it. *Thomas v. Williams*, 3 Dowl. 655. The motion must be founded upon an affidavit, stating that the debt or damages and costs still remain unpaid; and which affidavit must be made by some person who, from his connection with the cause, is likely to know the fact. See *Duke of Norfolk v. Spencer*, 4 Dowl. 746. In granting the rule, the court may annex to it such terms as they think proper. See *Bagnall v. Gray*, 2 W. Bl. 1140.

Engross the writ on parchment; see the forms in the Appendix; and deliver it to the sheriff to be executed. If the party against whom the writ is sued out, be within the bailiwick of the sheriff to whom it is directed, he may be summoned upon it, and the sheriff may make his return accordingly; and this may be done, as formerly, even on the return day of the *sci. fa.* but before the rising of the court. *Lewis v. Pine*, 2 Dowl. 133. If, however, he reside out of the bailiwick, reasonable notice must be given to him of the proceeding, otherwise the court will not allow judgment to be signed against him for want of appearance. *Wimall v. Cook*, 2 Dowl. 173. *Sabine v. Field*, 1 Cr. & M. 466. *Vide infra*.

If there be any irregularity in the writ, the party suing it out may have leave to quash it; *Pickman v. Robson*, 1 B. & A. 486; but by R. G. H. 2 W. 4, s. 78, "a plaintiff shall not be allowed a rule to quash his own writ of *scire facias*, after a

defendant has appeared, except on payment of costs." The rule is a rule *nisi* only. *Ade v. Stubbs*, 1 Har. & W. 520. *Oliverson v. Latour*, 7 Dowl. 605. In what cases the writ may be amended, *see post*, tit. "Amendment."

Judgment for want of appearance.] Formerly, if two writs of *scire facias* were sued out and returned *nihil*, judgment might be signed, although no attempt in fact had ever been made to summon the defendant. *See 2 Saund. 72, s.* But now, by R. G. H. 2 W. 4, s. 81, "no judgment shall be signed for non-appearance to a *scire facias*, without leave of the court or a judge, unless the defendant has been summoned; but such judgment may be signed by leave, after eight days from the return of one *scire facias*." This rule is not, perhaps, sufficiently explicit: the meaning of it, however, seems to be, that where the defendant has not been summoned upon the writ, you must satisfy the court of the endeavours made to apprise him of the proceedings, before they will allow you to sign judgment. *Higgins v. Wilkes*, 1 Dowl. 447. *Newton v. Maxwell*, 2 Crompt. & J. 635. *Sabine v. Field*, 1 Cr. & M. 466. We have seen (*ante*, p. 36), that if the party reside within the bailiwick, he should be summoned; if he do not reside within it, reasonable notice of the proceeding must be given to him. *Saunderson v. Brown*, 7 Law J., 29, *qb.*, 7 Ad. & El. 261. What notice has been given, and how given, must appear from the affidavit upon which you move for judgment. Service on a female who described herself as the defendant's housekeeper, and who stated that the defendant was absent in order to avoid the service of process,—has been deemed good service. *Dixon v. Thorold*, 8 Mees. & W. 297. Where sufficient notice was given to the defendant of a *scire facias* to revive a judgment, the court granted leave to sign judgment, though it appeared that the defendant at the time resided in Paris. *Weatherhead v. Landles*, 5 Dowl. 189.

The application, however, must be made within a reasonable time after the return of the writ: where the writ was returnable in April, and the motion not made until November, Littledale, J. held it to be too late, and refused the rule. *Wood v. Moseley*, 1 Dowl. 513. It may be necessary to remark, that the above rule extends to all cases of *scire facias*. *Jackson v. Elam*, 1 Dowl. 515.

If however the defendant have been summoned, (and which as formerly, may still be done even on the return day of the *scire facias*, but before the rising of the court, *Lewis v. Pine*, 2 Dowl. 133,) get the writ returned, and then enter a rule to appear; and if the defendant do not appear within four clear days, (and an intervening Sunday may be reckoned as one of the four, *Combe v. Cutill*, 3 Bing. 162), the plaintiff may then sign judgment.

Appearance.] Formerly an appearance was entered, as in ordinary cases. But now, by R. G. H. 2 W. 4, s. 82, "a notice in writing to the plaintiff, his attorney or agent, shall be a sufficient appearance by the bail or defendant on a *scire facias*." The notice may be in this form: "*Take notice that I appear for the defendant, upon the writ of scire facias issued in this cause;*" dated, directed, and intitled in the court and cause, as a notice in ordinary cases.

Declaration, &c.] After the defendant has appeared, the plaintiff must declare; see the form of the declaration, *Arch. Forms*, 443, 444. Where the *scire facias* was against two, and the declaration against one only, it was holden irregular. *Sainsbury v. Pringle*, 10 B. & C. 751.

The notice and rule to plead, and demand of a plea, are the same as in ordinary cases; see as to the plea, 2 *Saund.* 72 t-a. *Collins v. Beaumont*, 10 Ad. & El. 225.

See as to the issue, *Darling v. Gurney*, 2 Dowl. 235.

The execution may be by *fi. fa.* or *ca. sa. &c.*, as in other cases; but it must be founded on the judgment in the *scire facias*, although the *scire facias* were in fact unnecessarily sued out. *Davis v. Norton*, 1 Bing. 133. See the forms, *Arch. Forms*, 441, 442, 446, 447.

Costs.] Formerly, in most cases, there were no costs allowed in *scire facias*, until after plea pleaded or demurrer joined. But now, by stat. 3 & 4 W. 4, c. 42, s. 34, "in all writs of *scire facias*, the plaintiff, obtaining judgment on an award of execution, shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded or demurrer joined." See *Brewster v. Meeks*, 2 Dowl. 612.

SECTION VII.

Remittitur damna.

If the jury give greater damages than are laid in the declaration, the court will allow the plaintiff to enter a *remittitur damna* for the excess, even after error brought. *Usher v. Dansey*, 4 M. & S. 94. *Pickwood v. Wright*, 1 H. Bl. 642. So where the declaration consists of several counts, if the jury sever the damages, as for instance, give 50*l.* damages on the first count, and 100*l.* damages on the other counts, and one of the other counts be bad, the plaintiff may enter a *remittitur* as to the 100*l.* damages, and take his judgment for the 50*l.* *Dadd v. Crease*, 2 Cr. & M. 223, S. C. *nom. Dan v. Crease*, 2 Dowl. 269, and see 1 *Saund.* 285 n, 5, &c. *Mills v. Furnell*, 4 D. & R. 561. So where the jury give damages where they

not, as for instance in a penal action, the plaintiff may be mistaken by entering a *remittitur damna*, even after a verdict. *Hardy v. Cathcart*, 1 *Marsh.* 180. See the entry, *Arch. Forms*, 332, 354, 375.

SECTION VIII.

Costs.

1. Upon a verdict for plaintiff.

[*What cases.*] The plaintiff is entitled to costs, in all cases in which he recovers damages. *St. Gloucester*, 6 *Ed.* 1, c. 1, s. 2. The statute extends, not only to cases in which damages were recoverable previously to it, *Pilford's case*, 10 *Co.* 115. *Grout v. Brierley*, 1 *Dowl. N. C.* 58, but to cases where damages have been recovered by a subsequent statute. *Jackson v. Inh. of Coles*, 1 *T. R.* 71. *Crenwell v. Hoghton*, 6 *T. R.* 359. *Tyte v. T. R.* 267. *Witham v. Hill*, 2 *Wils.* 91. Therefore, in an action by a common informer for a penalty, the plaintiff is entitled to costs, (unless given to him by statute); for he may not recover damages by his verdict. See *Wilkinson v. Wainwright*, 366. *Jeynes v. Stevenson*, *Bull. N. P.* 194. But in an action for a penalty by a party grieved, where the penalty is laid in the party before he brings his action for it, there the plaintiff, if he recovers, is entitled to costs; for by common law, in such a case, he is entitled to damages for the detention of his property. *Ward v. Snell*, 1 *H. Bl.* 10. This right of a plaintiff to costs, however, has since been very much restrained by statute. By 8 & 9 *W. 3.*, c. 11, s. 3, in an action on the statute of *Edw. 6.* for the treble value of tithes, the plaintiff is not entitled to costs, unless the jury find the amount of the damages to be less than twenty nobles, (6 *l.* 13 *s.* 4 *d.*) See *Good v. Moss*, 1 *H. Bl.* 107. *Bale v. Hadgetts*, 1 *Bing.* 182. In an action on the case for slanderous words, if the plaintiff recovers less than 40 *s.* he shall have no more costs than damages, 21 *J.* 1, c. 16, s. 6, even although the defendant has a good justification; *Halford v. Smith*, 4 *East*, 567; which statute, however, extends only to cases of words actionable in themselves, or actionable only by reason of their being in the way of the plaintiff in the way of his trade or profession; *v. Horton, Willes*, 438. *Collier v. Gaillard*, 2 *W. Bl.* 1. *Grenfell v. Pierson*, 1 *Dowl.* 406. *Goodall v. Ensell*, 3 *T. R.* 743, 1 *Gale*, 147; but if special damage be laid, and damages be such that the action could not otherwise be maintained, there the smallest damages will carry costs. *Surin v. Shelleto*, 3 *Burr.* 1688, and see *Saville v. Jardine*, 2 *H.*

Bl. 531. This statute, however, although not expressly repealed, is in a great measure superseded by stat. 3 & 4 Vict. c. 94, hereinafter mentioned. Also by stat. 43 G. 3, c. 46, s. 4, in an action on any judgment recovered in any court in England or Ireland, the plaintiff shall not recover costs, unless the court or a judge thereof shall otherwise order. The judge at nisi prius has no power to order them. *Jones v. Lake*, 8 Car. & P. 395. The statute, however, extends only to judgments recovered by plaintiffs, and not to judgments of nonsuit or the like. *Bennett v. Neale*, 14 East, 343. Upon an application for costs in this case, the court grant a rule nisi only. *Fraser v. Moses*, 1 Dowd. N. C. 705.

In what not, if the judge certify.] By stat. 43 Eliz. c. 6, s. 2, if any action personal [except trespass, and trespass on the case, 3 & 4 Vict. c. 24, s. 1] in any of the courts at Westminster, "not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery," if the justices before whom the same shall be tried shall certify that the debt or damages do not amount to 40s. the court shall award the plaintiff no more costs than the debt or damages shall amount to, but less at their discretion. This statute extends to all personal actions, except those expressly excluded from it; therefore an action for debt or damages against an attorney is within it, although he could not be sued in a court of requests. *Wright v. Nuttall*, 10 B. & C. 492. And it has been holden to extend to actions on stat. 11 G. 2, c. 19, s. 19, for an irregularity in a distress, *Irwin v. Reddish*, 5 B. & A. 796, and on stat. 34 G. 3, c. 23, for copying a calico print, *Williams v. Miller*, 1 Taunt. 400, although these statutes expressly give the plaintiff full costs of suit. So a judge has power to certify, even although the defendant have pleaded two pleas embodying the same defence, contrary to one of the rules for pleading (R. G. H. 4 W. 4, s. 7), and which would otherwise entitle the plaintiff to his costs occasioned by those pleas. *Simpson v. Hurdiss*, 2 Mees. & W. 84. In construing the statute, therefore, we have only to consider what cases are within the exceptions.

This statute, 43 El. c. 6, s. 9, as far as it respects the actions of trespass, and trespass on the case, is expressly repealed by stat. 3 & 4 Vict. c. 24, s. 1; so that a judge has no longer a power to certify under this statute of Elizabeth, in those actions; but he may in all others, unless the case come within one or other of the exceptions in the statute itself. To judge whether a case comes within either of these exceptions, it is necessary to consider, not merely the declaration, but the pleadings, and also the evidence, in order to ascertain whether in fact any title or interest in lands comes in question,—whether it concern the freehold or inheritance; *Smith v. Ed-*

Dowl. 621, *per Coleridge, J.*; the declaration may not do it, but it does not conclusively show that it does not. If therefore it appears to be admitted upon the face of the record, by the pleading of either party, that any right to a writ of certiorari is put in issue, *Rawlins v. Till et al.*, 3 *Mees. & W.* 110, *per Purnell v. Young*, *Id.* 288. *Thomas v. Davies*, 8 *Ad. & Ell.* 110, or if it appear in issue upon the trial, *Wright v. Piggin*, 2 *Young & J.* 544, the court cannot grant the certificate. On the contrary, if it appears from the nature of the pleadings that such right cannot be questioned, the certificate may be granted. *Wilson v. Atkinson et al.*, 3 *Bing. N. C.* 307. *Jones v. Thomas*, 9 *Ad. & Ell.* 16, *q.b.* *Mills v. Stephens*, 3 *Mees. & W.* 460. A writ of certiorari cannot be granted by the judge of an inferior court although acting under a writ of trial; the statute is only to judges of the superior courts. *Jones v. Barnes*, 3 *Ad. & Ell.* 313, *S. C. nom.* *Jones v. Bond*, 5 *Dowl.* 455. *Per v. Richardson*, 1 *Ad. & Ell.* 75, 3 *Nev. & M.* 839. *Per v. Dudley*, 10 *Law J.*, 72, *cp.* Nor can it be granted in execution of a writ of inquiry; *Claridge v. Smith*, 4 *Ad. & Ell.* 3, 1 *Har. & W.* 667; but it may, where one of two defendants allows judgment to go by default, and the other pleads to trial. *Harris v. Duncan*, 4 *Nev. & M.* 63. The writ may be granted at, or at any time after, the trial, and costs are allowed; *Per Parke, B.*, in *Morgan v. Thorne*, 1 *Ad. & Ell.* 401; even where it was granted after the costs had been paid, the defendant's attorney having attended the trial, was holden good. *Foxall v. Banks*, 5 *B. & A.* 536. The judge said at the trial that he would grant the writ and afterwards, before he did it, the plaintiff obtained a writ, entered the postea on it, taxed costs and signed a writ; and the defendants to prevent an execution, paid under protest: the judge then made an order that the writ should be produced before him for the purpose of inquiring into the certificate upon it, that the master should review the judgment, the judgment be altered, and that the plaintiff refund the costs; and the court upon application reversed this order. *Davis v. Cole*, 9 *Law J.*, 258, *ex. c.* *W.* 624. If granted where the judge has no authority, the court upon application will direct the master to tax the plaintiff his costs, notwithstanding the certificate; *Rawlins v. Purnell v. Young*, *Thomas v. Davies*, *Scruton v. Purnell*; but if the judge have authority, the court will interfere, or enter into any inquiry whether he have exercised discretion rightly in granting it, or not. *Cann v. Facey*, 1 *Ad. & Ell.* 405, 1 *Har. & W.* 482. *Twigg v. Potts*, 4 *Dowl.* 110, whether having once granted it, the judge can afterwards rescind it, has been questioned; but if he can, it must be at a reasonable time, and seemingly before judgment.

Whalley v. Williamson, 5 Bing. N. C. 200. Patteson, J., however, in *Anderson v. Sherwin*, 7 Car. & P. 527, after having granted the certificate at the assizes, in the following term made an order to set it aside, without costs, upon a statement by affidavit, of new facts which did not appear at the trial, and upon hearing the attorneys on both sides in the ordinary way.

In what not, if the judge do not certify.] By stat. 3 & 4 Vict. c. 24, (after repealing the stat. 43 Eliz. c. 6, above mentioned, as far as it relates to trespass, or trespass on the case, and the stat. 22 & 23 Car. 2, c. 9, upon the same subject, as far as the same related to personal actions,) it is enacted by sect. 2, that "if the plaintiff in any action of trespass, or trespass on the case, brought or to be brought in any of Her Majesty's courts at Westminster, or in the court of Common Pleas at Lancaster, or in the court of Common Pleas at Durham, shall recover by the verdict of a jury less damages than forty shillings, such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, whether it shall be given on any issue or issues tried, or judgment shall have passed by default,—unless the judge or presiding officer, before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to try a right, besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought,—or that the trespass or grievance, in respect of which the action was brought, was wilful and malicious.

It is provided, however, by sect. 3, that the statute shall not extend to deprive any plaintiff of costs, in any action brought for a trespass over any lands, commons, wastes, closes, woods, plantations or inclosures,—or for entering into any dwellings, outbuildings or premises,—in respect of which any notice not to trespass thereon or therein shall have been previously served, by or on behalf of the owner or occupier of the land trespassed over, upon or left at the last reputed or known place of abode of the defendant or defendants in such action.

This statute extends to all actions of trespass, and trespass on the case; to case for negligence, *Marriott v. Stanley*, 1 Man. & Gr. 853, and case for the infringement of a patent, *Gillett v. Green*, 7 Mees. & W. 347, as well as others. As to what is a right, within the meaning of the statute, it has been holden that an action for a nuisance by carrying on an offensive trade so near the plaintiff's house and gardens, as to render the air unwholesome, &c., to which a plea merely of not guilty was pleaded, was an action brought to try a right within the meaning of the statute, namely, the right of the plaintiff to enjoy his house free from the nuisance caused by the defendant. *Shuttleworth v. Cocker*, 1 Man. & Gr. 829. So an action by

odor of certain medicines against another for selling a medicine in his name, and wrapped up in similar cases, has been holden an action to try a right within the scope of the statute. *Morrison et al. v. Salmon*, 9 Dowl. Law J., 91, *cp.* It has been holden also, that in an action for a libel, the judge may certify that it was wilful and malicious. *Foster v. Pointer*, 8 Mees. & W. 395.

The statute requires the certificate to be given "immediately after the trial. This however is construed to mean within a reasonable time. And where the cause happened to be tried at the assizes, and upon the verdict being given, the judge immediately adjourned the court to his lodgings, where the defendant's counsel followed him in about a quarter of an hour, and immediately applied for and obtained the certificate: the court held it to be sufficient. *Thompson v. Gibson et al.*, 8 Mees. & W. 677.

So where an application was made to an undersheriff, immediately after the execution of a writ of inquiry, for his certificate that the trespass had been wilful and malicious, and having made up his mind as to its being malicious, he refused the certificate until he should consider the matter, the court was adjourned to the same evening for other business; but upon the court meeting again in the evening, he granted the certificate: this was holden to be sufficient. *Pearce*, 8 Mees. & W. 677.

So, where the cause occurred whole of the day, and the jury in the evening retired to consider of their verdict, but did not deliver it until eleven at night, when the associate (by the consent of parties) immediately delivered and recorded it; the next morning, after another juror was called on, and one of the jurors sworn, an application was made for a certificate, and granted: this was holden to be sufficient time. *Nelmes v. Hodges et al.*, 2 Dowl. N. C. 350. The court will not interfere with the discretion of the judge in granting this certificate, provided the action be one in which a certificate may be granted, within the meaning of the statute. *Barker v. Hollier*, 8 Mees. & W. 513.

Even where a certificate is granted by an undersheriff, upon the execution of a writ of inquiry, the court of Common Pleas evinced the greatest reluctance to review the propriety of his granting it, saying that at least the party applying to them should first have obtained the acquiescence of the undersheriff in the statement of facts on which it was granted, and which not having been obtained, they refused the application. *Pryme v. Brown*, 1 Dowl. 380.

It may be necessary to mention that, by consent, a power may be given to an arbitrator to grant a certificate under this statute, and his certificate, though not indorsed on the record, is good. *Spain v. Caddell*, 10 Law J., 313, *ex.*, 9 Dowl. 45.

By stat. 4 & 5 W. & M. c. 23, s. 10, if inferior tradesmen, apprentices, (unless in company with their master, duly qualified), or other dissolute persons, presume to hunt, hawk, fish or fowl, they may be sued for their wilful trespass in coming upon any man's land; and if found guilty, the plaintiff shall not only recover his damages, but full costs. See *Buxton v. Mingay*, 2 Wils. 70. If the plaintiff fail in proving the defendant to be an inferior tradesman, &c., within the act, and the damages be under 40s., he will be entitled to no more costs than damages, unless the judge certify. *Pellant v. Roll*, 2 W. Bl. 900.

Lastly, by stat. 8 & 9 Will. 3, c. 11, s. 4, "in all actions of trespass, wherein at the trial of the cause it shall appear, and be certified by the judge under his hand upon the back of the record, that the trespass of which the defendant shall be found guilty was wilful and malicious, the plaintiff shall recover not only his damages, but his full costs." See stat. 3 & 4 Vict. c. 24, ante, p. 42. Formerly it was holden that if the trespass were committed after notice, the judge was bound to certify under this act; *Reynolds v. Edwards*, 6 T. R. 11; but it is now holden to be in all cases in his discretion whether he will certify or not, *Good v. Watkins*, 3 East, 495, although it is usual to do so, where the trespass is proved to have been committed after notice. The certificate in this case may be granted out of court, at any time before final judgment. *Woolley v. Whitby*. 2 B. & C. 580.

If defendant have been arrested without probable cause.] By stat. 43 G. 3, c. 46, s. 3, in all actions wherein the defendant shall be arrested and held to special bail, and wherein the plaintiff shall not recover the amount of the sum for which the defendant shall have been so arrested and held to special bail, such defendant shall be entitled to costs of suit provided that it shall be made to appear to the satisfaction of the court in which such action is brought, upon motion to be made for that purpose, and upon hearing the parties by affidavit, that the plaintiff had not any reasonable or probable cause for causing the defendant to be arrested and held to special bail in such amount as aforesaid, and provided such court by a rule or order shall direct that such costs shall be allowed to the defendant: upon such rule being made, the plaintiff shall be disabled from taking out execution for the sum recovered by him in the action, unless the same exceed, and then only in such sum as it shall exceed, the amount of the taxed costs of the defendant; if it be less, the defendant shall have execution for the excess of his costs above the sum recovered by the plaintiff.

To entitle a defendant to costs under this statute, where the

recovers a less sum than that for which he held the defendant to bail, it must appear from the affidavits: that the defendant was in fact "arrested and held to bail," and for what amount. He must be both arrested and put on special bail: putting in bail without being arrested, *Bates v. Pilling*, 2 Cr. & M. 374. *Robinson v. Mees*, 5 Mees. & W. 479. *James v. Askew*, 8 Ad. & El. 1. *Reynolds v. Matthews*, 7 Dowl. 580, or being discharged from arrest, in any other way than by putting in bail, *Burton*, 9 Dowl. 492, and see *Edwards v. Jones*, 4 W. 414, *Amor v. Blofield*, 1 Dowl. 277, is not sufficient.

If the plaintiff recovered a certain sum only. If this sum be omitted in the affidavit, the court may refer to the judge's notes taken at the trial, to supply the omission. *Twiss v. Hunter*, 1 Har. & W. 273. The verdict is conclusive that the sum found by it (if any) is the amount of the debt due from the defendant to the plaintiff. The court will not retry the facts of the case upon affidavit; it will take them as the jury have found them. *Twiss v. Hunter*, 4 Dowl. 107, 1 Har. & W. 274, n. The court have refused to attend to affidavits tending to show that the verdict was erroneous. *Id.* So, where the plaintiff by his affidavit denied an agreement which had been proved at trial and swore that the whole sum claimed was justly due, the court disregarded the affidavit, and acted upon the verdict given at the trial. *Glenville v. Hutchins*, 1 B. & C. 1. It was holden to be no answer to an application of the plaintiff (although probably a ground for a new trial) that the plaintiff's demand had been reduced at the trial by the testimony of a witness, who was in fact a partner of the plaintiff, although she swore she was only his servant. *Gardiner*, 5 Nev. & M. 424. But where a witness at trial proved a payment of 24*l.* by the plaintiff for the plaintiff, and which formed part of the sum for which the plaintiff had been holden to bail; but the jury disbelieving the plaintiff's verdict for the residue of the demand only: upon application on this statute, to tax the defendant his costs, the court held, that under the circumstances it did not appear that there was such an absence of reasonable and probable ground as would warrant them in granting the rule. *Smith v. Dowl.* 733. The affidavit must show also that the sum recovered, in the legal sense of that term; if upon a balance between the parties, the plaintiff take a smaller sum than that for which he held the defendant to bail, it will come within the meaning of the act. *Linthwaite v. Smith*, 667. So if the defendant pay money into court, and the plaintiff take it out, and proceed no further in

the action: this is no ground for an application upon this statute, however disproportionate the sum paid in and that sworn to may be; for the sum is not recovered within the meaning of the statute. *Rouvey v. Alefson*, 13 East, 90. *Butler v. Brown*, 1 Brod. & B. 66. *Porter v. Pittman*, 2 D. & R. 266. *Davey v. Renton*, 2 B. & C. 711. *Rowe v. Rhodes*, 2 Cr. & M. 379. And the same, where the payment into court is pleaded, and the plaintiff takes the money out and proceeds to tax his costs; the new rule, requiring it to be pleaded, making no difference. *Brookes v. Rigby*, 4 Nev. & M. 3. So, for the same reason, if the cause be referred to an arbitrator, and he award a less sum to the plaintiff than that for which he has holden the defendant to bail, it is not a case within the statute, *Holder v. Raith*, 4 Nev. & M. 466, 1 Har. & W. 8. *Payne v. Aston*, 1 Brod. & B. 278. *Keene v. Deeble*, 3 B. & C. 491. *Sherwood v. Taylor*, 6 Bing. 280, unless the cause be referred at *nisi prius*, and a verdict taken subject to the award, *Turner v. Prince*, 5 Bing. 191, and see *Silversides v. Bowley*, 1 Moore, 92, or the cause and all matters in difference be so referred, and the award adjudicate on the matter of the action distinctly from the others; *Jones v. Jehu*, 5 Dowl. 130, 2 Har. & W. 119; and even in that case the court will not entertain the motion, if by the terms of the reference the costs were to abide the event. *Thomson v. Atkinson*, 6 B. & C. 193. Where a verdict was taken, and the cause referred at *nisi prius*, and by the order the same power was given to the arbitrator that the court possessed with respect to the defendant's costs; the defendant had been holden to bail for 109*l.*, and the arbitrator awarded 50*l.*, but made no order as to the defendant's costs under this statute: upon an application to the court to tax the defendant's costs, on the ground of his having been holden to bail for 109*l.*, without reasonable or probable cause, Williams, J., said, that as the arbitrator, who had heard all the evidence, had declined to make the order, he could not interfere. *Greenwood v. Johnson*, 3 Dowl. 606, 1 Har. & W. 184.

3. That the plaintiff had not any "reasonable or probable cause" for holding the defendant to bail for such an amount. It is not necessary to show malice. *Donlan v. Brett*, 10 B. & C. 117. *Erle v. Wynne*, 1 Cr. & M. 532. And on the other hand it is not sufficient to show that the plaintiff has recovered a less sum; *Roper v. Shevely*, 2 Dowl. 14; although if the difference be very great, (as for instance, where the arrest was for 33*l.*, and the plaintiff recovered only 3*l.* 9*s.*), and be not explained by the affidavits on the part of the plaintiff, that circumstance alone may satisfy the court that there was no reasonable or probable cause for the arrest; *Summers v. Grosvenor*, 3 Cr. & M. 341. *Nicholas v. Hayter*, 4 Nev. & M. 882, and see *Hall v. Forget*, 1 Dowl. 696; and in proportion as the

ence is smaller, the evidence of want of reasonable and probable cause must be more cogent and satisfactory. See *v. Barker*, 1 Har. & W. 208. *Pincher v. Brown*, 3 Moore, 11. If the difference arise from the plaintiff holding the defendant to bail for the amount of items in his account, of which he knew he had no evidence, the court will grant the defendant his costs. *Griffiths v. Pointon*, 2 Nev. & M. 675. *Wells v. Hayter*, *supra*. *Lewis v. Ashton*, 1 Mees. & W. 498. *Wells v. Whitehead*, 6 Dowl. 292. Where the plaintiff held the defendant to bail for a sum for board and lodging, calculated after the rate of 2l. a week, and at the trial it was proved that the defendant had expressly agreed to charge at the rate of 1l. a week only, and a verdict was given accordingly: the court granted the defendant his costs under this statute, although the plaintiff in his affidavit swore that he never made any such agreement as that proved at trial. *Glenville v. Hutchins*, 1 B. & C. 91. See *Anon. v. Smith*, 261. So where the plaintiff sold goods to the defendant, to be paid for, half in ready money, and the other half by a bill at three months; and the defendant having refused to pay the half in ready money, the plaintiff arrested the defendant for the whole: the court held that he had no reasonable and probable cause for doing so, and that the defendant thereupon was entitled to his costs. *Day v. Pickton*, 10 B. & C. 120. Where the plaintiff agreed with the defendant to do the iron work of four houses at certain prices, and the amount was paid to him; he afterwards agreed to do the iron work of two other houses at the same prices, and subsequently made the iron work for two others without any express agreement upon that subject, but for the last four houses it was doubtful whether he was to be paid by the defendant or one J. P.; he put in his account to J. P., amounting to 44l., according to the agreed prices, and because J. P. did not pay him, he arrested the defendant, not merely for the amount according to the agreed prices, but for 65l., the amount according to the real value, and at the trial he obtained a verdict for 65l. only: the court held that he had no reasonable and probable cause for holding the defendant to bail for the 65l., and that the defendant therefore was entitled to his costs. *v. Milnes*, 1 Bing. N. C. 738, 1 Hodg. 118. So, where goods were sold and delivered by the plaintiff to the defendant, and the defendant objected to them on the ground of their being badly manufactured, and the plaintiff agreed to take them back, and they were sent back accordingly; the plaintiff then again sent them to the defendant, and then arrested the defendant for the amount: the plaintiff having recovered less than the amount for which he held the defendant to bail, the court held the defendant to be entitled to his costs. *Linley v. Bates*, 1 Nev. & M. 753. See also *Russell v. Atkinson*, 2 Nev. & M. 667.

Where the plaintiff bought a horse from the defendant for 90*l.*, warranted sound, for which he gave his own horse, valued at 60*l.*, and 30*l.* in money; the horse purchased turned out to be unsound, and the plaintiff offered to return him, but the defendant refused to take him back, and the horse was accordingly sent to a livery stable to be kept for the defendant; the plaintiff then brought an action on the warranty against the defendant, and held him to bail for the 90*l.*, but at the trial recovered 48*l.* only: the court held that the plaintiff had no right to treat the contract as rescinded, and arrest the defendant for the whole of the 90*l.*, and that the defendant therefore was entitled to his costs under this statute. *Gompertz v. Denton*, 1 Dowl. 623. Where the plaintiff caused the defendant to be arrested for a debt, with respect to the greater part of which he knew he had been discharged under the insolvent act, and at the trial the plaintiff recovered for the residue only: the court held the defendant to be entitled to his costs under this statute. *Ld. Huntingtower v. Heeley*, 7 D. & R. 369. If the plaintiff and defendant have cross demands upon each other, and the plaintiff, instead of holding the defendant to bail for the balance merely, hold him to bail for the whole amount of the debtor side of his account, and recover for the balance only: the court will grant the defendant his costs under the statute. *Dronefield v. Archer*, 5 B. & A. 513. *Sims v. Jaquest*, 2 Dowl. 800, and see *Austin v. Debnam*, 3 B. & C. 139. And where a plaintiff thus held a defendant to bail for 105*l.*, the whole amount of the debtor side of his account when he knew that he was indebted to the defendant in one sum of 39*l.*, and others of which he did not know the amount, and he recovered but 17*l.*: it was holden to be no answer to an application for costs under this statute, to say, that the defendant refused to make out and deliver his account when required to do so. *Ashten v. Naull*, 2 Dowl. 727. So where the plaintiff caused the defendant to be arrested for 1,123*l.*, when he had the means of knowing that only 715*l.* was due to him, the court held the defendant to be entitled to his costs. *Foster v. Weston*, 6 Bing. 527. Where the arrest was for 68*l.*, as the balance of a long account between the parties, and only 23*l.* recovered, and it appeared upon an investigation of the plaintiff's accounts before an arbitrator that they were kept most inaccurately, forty or fifty items in them being found to be wrong, and sums charged for disbursements which had never been made: the court awarded the defendant his costs under this statute, although it appeared that the defendant, before action brought, but at a time when he was not apprised of the inaccuracies in the account, offered to accept a bill for the alleged balance of 68*l.* *Hall v. Forget*, 1 Dowl. 696. So where the arrest was for 86*l.*, and the sum recovered

15*l.* only, and it appeared that the only cause of action was for unliquidated damages, for which the plaintiff should not have holden the defendant to bail at all: the court granted the defendant his costs. *Beare v. Pinkus*, 4 *Nev. & M.* 846. So where the plaintiff sent in his bill to the defendant, a lady, amounting to 18*l.*, and not being paid, sent in another with an additional item of 2*l.* for a pair of stays furnished by him, but which at the trial were proved to have been previously returned, as not fitting the defendant; he then had the defendant arrested for the 20*l.*, and accompanied the officer who made the arrest; but at the trial, he had a verdict for the 18*l.* only: upon an application by the defendant for costs, the court granted them, saying that there was no reasonable or probable cause for the arrest as far as respected the 2*l.*, and without that the defendant could not have been arrested. *Sutton v. Burgess*, 4 *Dowl.* 376. So where the defendant, an infant, being arrested for 20*l.* 2*s.* 1*d.*, pleaded his infancy, to which the defendant replied that the goods were necessities; at the trial the plaintiff succeeded upon his replication, but was able to prove the delivery of goods to the amount of 10*l.* only, and he had a verdict for that amount: upon an application by the defendant for costs, the court granted them, although the plaintiff swore to the delivery of the whole of the goods; but the court would look only to the verdict upon that subject; and they added, "it is well that parties should know, when a debt amounts just to 20*l.*, the risk they run in making an arrest." *Ballantine v. Taylor*, 1 *Nev. & P.* 219. Where the defendant was arrested for 28*l.* for beer, and at the trial it appeared that he lodged at the house of the plaintiff, who kept a beershop, that he was almost constantly drunk, that whilst drunk he was still furnished with beer by the plaintiff, both for himself, and for any other persons whom he chose to treat with it, upon one occasion to the extent of thirty-six quarts in the day: and upon the judge telling the jury that it was improper to supply the defendant with beer whilst in a state of intoxication, the jury gave the plaintiff a verdict for 5*l.* only: this was holden to be a case within the statute, and the court granted the defendant his costs. *Erie v. Wynne*, 2 *Dowl.* 23. Where an attorney held his client to bail for 500*l.*, the amount of his bill delivered, but which, on being referred for taxation, was taxed at 299*l.*: upon an application by the defendant for his costs under this statute, the court referred it to the master to say whether the plaintiff had any reasonable and probable cause for holding the defendant to bail for 500*l.*, and upon the master reporting in the negative, the court granted the defendant his costs. *Robinson v. Elsam*, 5 *B. & A.* 661. Also, if executors hold to bail without reasonable or probable cause, they are liable to pay costs under this statute, in the same manner as other

persons; for they would be liable to an action, and this is an analogous remedy; *Treley v. Reid*, 5 B. & A. 515; but the court will require a strong case to be made out, to induce them to grant a rule under this statute against an executor. See *Foulkes v. Neighbour*, 1 Marsh, 21.

But where the difference between the sum for which the defendant was holden to bail and the sum recovered, consisted of an item, for which it might reasonably be doubted whether in law the plaintiff was not entitled to recover: the court held it not to be a case in which the defendant ought to have his costs under this statute. *Stovin v. Taylor*, 1 Nev. & M. 250, 1 Dowl. 697, n. See *James v. Francis*, 5 Price, 1. And where a woman, being arrested for 500*l.*, pleaded her coverture, and the plaintiff recovered only 38*l.*, being the amount of money which he had lent to her after the death of her husband; she then applied for costs, but showed no facts from which it could be implied that the defendant knew her to be married whilst she was incurring the residue of the debt, and on the other hand the plaintiff swore most positively that he was not aware of the defendant's being a married woman: the court held the defendant not to be entitled to her costs. *Spooner v. Danks*, 7 Bing. 772. 1 Dowl. 232. So where the difference arose from the different testimony given by the witnesses for the plaintiff and for the defendant, as to the price of the goods for the value of which the action was brought, the jury taking a mean of their estimates, and finding their verdict accordingly: the court refused to grant the defendant his costs. *Shotwell v. Barlow*, 1 Gale, 107, 3 Dowl. 709. And see *Mantell v. Southall*, 2 Bing. N. C. 74. So, where the arrest was in an action for the amount of some chests of tea, and the difference arose from the plaintiff making an allowance for one of the chests, which was found to be damaged, and the jury finding their verdict for the other chests only, upon an understanding that the damaged chest should be returned to the plaintiff: the court held the defendant not to be entitled to his costs. *Clare v. Cooke*, 4 Bing. N. C. 269. So, where the plaintiff, an architect and surveyor, brought his action for a per centage on the alleged cost of a building, but received a less sum than that for which he had holden the defendant to bail, owing to a difference between the testimony of the witnesses on both sides, the one set swearing that the building must have cost 5,000*l.*, the other that it was worth only between 2,000*l.* and 3,000*l.*, and the defendant, upon the motion, not swearing to what it actually cost: the court refused him the costs, as it was for him to make out the want of probable cause. *Day v. Clarke*, 5 Bing. N. C. 117. So where the affidavit was for 27*l.*, the writ by mistake for 37*l.*, but the claim of debt indorsed on the back of it was for 27*l.* only, and the officer was apprised of

the mistake, and desired to arrest for 27*l.* only; at the trial the plaintiff proved a debt to the amount of 28*l.*, but owing to the omission of a count in his declaration applicable to a part of his demand amounting to 8*l.*, he obtained a verdict for 20*l.* only: the court refused to grant the defendant his costs under this statute, holding that this was an arrest for 27*l.* only, and that the plaintiff had reasonable and probable cause for holding to bail to that amount. *Preedy v. M'Farlane*, 1 Cr. M. & R. 819. So where the defendant was arrested for 100*l.*, and the arbitrator to whom the cause was referred awarded the plaintiff 39*l.* only; yet as it appeared that the accounts were very complicated, the court refused to give the defendant his costs. *Turner v. Prince*, 5 Bing. 191. And see *Sherwood v. Taylor*, 6 Bing. 280. So where the plaintiff held the defendant to bail for 48*l.*, and recovered 44*l.*, the difference being the amount of a tea urn, which was proved to have been returned; but it also appeared that the plaintiff was not aware of its being returned, nor did the defendant apprise him of it until he proved it at the trial: the court under these circumstances refused the defendant his costs. *Roper v. Sheasby et al.*, 1 Cr. & M. 496, S. C. nom. *Roper v. Sheveley*, 2 Dowl. 14. So where the arrest was for 28*l.*, and the defendant having pleaded the statute of limitations as to 11*l.*, the plaintiff recovered only 17*l.*; but it appearing also that the defendant had orally promised the plaintiff to pay the 11*l.* several times shortly before the action, the court refused him the costs. *White v. Prickett*, 4 Bing. N. C. 237.

4. As to the motion: it can be made only in the court in which the action was commenced. And therefore where a cause in the palace court was removed into one of the courts at Westminster, and tried there, the latter court refused to entertain an application for costs under this statute. *Costello v. Corlett*, 4 Bing. 474. *Handley v. Levy*, 8 B. & C. 637. *James v. Dawson*, 1 Dowl. 341. *Connell v. Watson*, 2 Dowl. 139. The motion also must be made before final judgment signed and costs taxed, otherwise it will be too late. *Rennie v. Yorston*, 8 Dowl. 326.

If the defendant might be sued in a court of requests, &c.] It is unnecessary to give here a list of the different local acts of parliament, by which courts of request, courts of conscience, &c., throughout the country are established or regulated; there are but few attornies, residing within the jurisdiction of such a court, or in its neighbourhood, that are not provided with a copy of the act relating to it. It may be desirable however to make a few observations upon these acts generally, in order to draw the attention of attornies to the subject; as it is often of great importance that an attor-

ney, before he commences an action, or before he shapes his defence to it, should ascertain correctly whether the cause of action is such as may be sued for in any court of this description.

These acts are usually confined to cases of debt, for which an action of debt on simple contract or indebitatus assumpsit would lie, if sued for in the courts at Westminster: see *Sanby v. Miller*, 5 East, 194: the jurisdiction of courts of request seldom, if ever, extend to suits for the breach of special agreements, not being for the payment of money, see *Jonas v. Greening*, 5 T. R. 529. *Mansfield v. Breary*, 3 Nev. & M. 471. *Wiltam v. Urry*, 2 Dowl. 543, and never to actions of trespass, or on the case for torts. See *Lawson v. Moggridge*, 1 Taunt. 396. *Fost v. Coare*, 2 B. & P. 588. Some prohibit suits for the balance of an account, where the account itself originally exceeded the sum to which the jurisdiction is limited; see *Harsant v. Larkin*, 3 Brod. & B. 257. *Moreau v. Hicks*, 4 Nev. & M. 563, 1 Har. & W. 87; others do not. See *Walker v. Watson*, 8 Bing. 414. *Fomin v. Onwell*, 1 M. & S. 593. Some prohibit all suits for rents; and this has been holden to extend to suits for use and occupation, see *Woolley v. Cloutman*, Doug. 232, 244. *Kidd v. Mason*, 3 Dowl. 96. *Holden v. Newman*, 13 East, 161, and even to a suit against a receiver who had received rent; *Drew v. Fletcher*, 1 B. & C. 283; others do not. See *Axon v. Dallimore*, 3 D. & R. 51. Some require that the cause of action should arise within the jurisdiction; *R. v. Danser*, 6 T. R. 242. *Bailey v. Chitty*, 5 Dowl. 307; others do not. *Baildon v. Pitter*, 3 B. & A. 210. *Oakes v. Albin*, M'Clel. 582. But none of them extend to contracts made at sea. See *M'Collam v. Carr*, 1 B. & P. 223.

The sum is always specifically limited, within which parties may sue in the court of requests: often 40s. in analogy to the jurisdiction of the county court; sometimes 5*l.*, and in some instances even 10*l.* And where, instead of suing in the court of requests, the plaintiff brings an action in one of the courts at Westminster, and recovers, the verdict will be deemed conclusive as to the amount of the debt due from the defendant to the plaintiff at the commencement of the action; *Drew v. Coles*, 2 Crompt. & J. 505. *Chadwick v. Bunning*, 5 B. & C. 532. *Younger v. Wilsby*, 6 Taunt. 452. *Cross v. Collins*, 5 Bing. N. C. 194; even where the plaintiff was not able to establish the whole of his claim, by reason of the absence of a witness, and he therefore had a verdict for less than the amount, the case was holden to be within a court of requests act. *Moore v. Jones*, 2 Dowl. 58. This, however, must not be deemed to extend to cases, where the original debt is reduced within the limited sum by a set off, *Gobed v.*

Birt, 2 Chit. 394. *Jenkinson v. Norton*, 5 Dowl. 74. *McColiam v. Carr*, 1 B. & P. 223. *Porter v. Philpot*, 14 East, 344, or where there is a plea of tender, *Waistell v. Atkinson*, 3 Bing. 289. *Downes v. Ray*, 1 Har. & W. 649, or of money paid into court, *Miller v. Williams*, 5 Esp. 19. See *Turner v. Barnard*, 5 Dowl. 170, and the plaintiff has a verdict for a small sum beyond the money tendered or paid in. So, when the defendant pays money into court, and the plaintiff accepts it in satisfaction, it is not deemed to be within these acts. *Tarrant v. Morgan*, 2 Cr. M. & R. 252. *Jordan v. Berwick*, 9 Mees. & W. 3. See *Thompson v. Gill*, 6 Dowl. 155. But it is otherwise, if the amount be reduced by a payment on account before action brought, *Nightingale v. Barnard*, 4 Bing. 169. *Chadwick v. Bunning*, 5 B. & C. 532. *Clarke v. Ashew*, 8 East, 28. *Horne v. Hughes*, 8 East, 317, or, it seems, by a plea of the statute of limitations. *Shaddick v. Bennett*, 4 B. & C. 769. *Bailey v. Chitty*, 2 Mees. & W. 28.

The statutes upon this subject, vary very much as to the required residence of the parties within the jurisdiction of the court of requests: some require actual residence; others merely that the party shall seek his livelihood or have his place of business within it; some require only the defendant to reside within the jurisdiction; see *Baildon v. Pitter*, 3 B. & A. 210. *Lees v. Rogers*, 4 Taunt. 150. *Graham v. Browne*, 1 Dowl. 309; others require both plaintiff and defendant. *Brooks v. Moravia*, 2 H. Bl. 220. *Dillamore v. Capon*, 1 Bing. 388. *Busby v. Fearon*, 8 T. R. 235. And it will be no answer to an objection, for suing in a superior court instead of a court of requests, to say that the plaintiff was not aware of the defendant's residing within its jurisdiction. *Crowder v. Bell*, 2 Dowl. 508. Attornies, unless specifically named in these acts, are not deemed to be within them, either as plaintiffs, *Hessey v. Jordan*, Doug. 382, *cit.* *Johnson v. Bray*, 2 Brod. & B. 698. *Board v. Parker*, 7 East, 46, (although they now sue as common persons, provided they sue in the court of which they are attornies, *Wright v. Skinner*, 1 Mees. & W. 144,) or defendants; *Wiltshire v. Lloyd*, Doug. 366, 381. *Hodding v. Warrand*, 7 East, 50; barristers are. *Wetienhall v. Wakefield*, 2 Dowl. 759. Assignees of bankrupts are within them, unless expressly excepted. *Keay v. Rigg*, 1 B. & P. 11. *Ward v. Abrahams*, 1 B. & A. 367. So are executors and administrators, when plaintiffs; *Wace v. Wyburd*, Doug. 234, 246; but not when defendants, unless expressly named in the act. *Ailway v. Burrows*, Doug. 250, 263.

If a plaintiff sue in one of the courts at Westminster, for a cause of action cognizable by one of those courts of request, the statute regulating the latter court sometimes exempts the defendant from costs in the court above, often obliges the

plaintiff to pay costs, and sometimes double and even treble costs. This may in some cases be after judgment by default; see *Dunster v. Day*, 8 East, 239; in others, not unless there have been a trial: *Harris v. Lloyd*, 4 M. & S. 171. *Jackman v. Cocher*, 5 Mees. & W. 147: sometimes where a cause is referred to arbitration, and award made, *Day v. Moarns*, 3 Chit. 156, sometimes not: according to the wording of each particular statute. But it makes no difference whether the cause be tried before a judge of the superior courts, or before the judge of any inferior court or undersheriff by virtue of a writ of trial. *Bond v. Bailey*, 3 Dowl. 808, 1 Gale, 162. *Shaw v. Oates*, 4 Dowl. 720. *Turner v. Barnard*, 5 Dowl. 170. *Cread v. Harris*, 1 Har. & W. 657. *Forbes v. Simmons*, 9 Dowl. 37.

As to the mode of making the objection, it will depend upon the manner in which the act regulating the court of requests is worded. If the act contain prohibitory words, "that no action for any debt not amounting to [40s.] and recoverable by this act shall be brought against any person residing within the jurisdiction," &c., or the like, it is in that case a defence to the action, *Parker v. Elding*, 1 East, 352, and may be pleaded in bar; *Taylor v. Blair*, 3 T. R. 452. *Clerke v. Hamlet*, 1 Har. & W. 177. *Reynolds v. Tollman*, 11 Law J., 94, qb.; and if the defendant neglect to plead it, he will not be allowed to enter a suggestion to the like effect, in order to deprive the plaintiff of costs. *Id.* and see *Defries v. Small*, 4 Dowl. 680. But where the statute does not contain such prohibitory words, it cannot be pleaded, *Barney v. Tubb*, 2 H. Bl. 350. *Sandall v. Bennett*, 3 Dowl. 294, but the defendant must apply for leave to enter a suggestion to the like effect upon the record. Or where the statute merely deprives the plaintiff of costs, the defendant may perhaps move to stay the proceedings in the action, on payment of the debt without costs, after verdict, or after the execution of a writ of inquiry upon judgment by default, (where that is within the statute) see *Flaming v. Davies*, 5 D. & R. 371, but not before, *Meredith v. Dron*, 1 Dowl. 252. *Culliford v. Dyche*, 2 Chit. 395, and not in any other case.

The application to enter a suggestion on the roll, upon a court of requests act, must be made before final judgment, *Calvert v. Everard*, 5 M. & S. 510. *Unwin v. King*, 3 Dowl. 593, and see *Watchorn v. Cook*, 2 M. & S. 348, if judgment be signed in terms; and where it was signed on the last day of the term, the court entertained the application at the beginning of the following term, the costs not being then taxed. *Godson v. Lloyd*, 4 Dowl. 157. 1 Gale, 244. But where the cause was tried in vacation, and the judge made an order for immediate execution, which was accordingly sued out and executed, the court held that the defendant might afterwards in

the following term, within the time limited for moving for a new trial, move for leave to enter such a suggestion on the roll. *Bodley v. Oliver*, 1 Cr. & M. 219. *Heale v. Erle*, 2 Mees. & W. 383. *Johnson v. Beale*, 8 Law J., 255, ex., 5 Mees. & W. 276. The general rule however is, that the defendant must apply promptly. See *Hippesley v. Layng*, 4 B. & C. 863.

Care must be taken that the affidavit bring the defendant within the terms of the act; see *Newton v. Peacock*, 1 Dowl. 677. *Umwin v. King*, 2 Dowl. 492. *Fossatt v. Godfrey*, Id. 587. *Burton v. Campbell*, 6, Id. 451. *Bishop v. Marsh*, 8, Id. 1. And it must show that he was so at the time of the commencement of the action.

The rule is a rule *nisi*, which is afterwards made absolute in the usual way. After the rule absolute has been obtained, you may require the plaintiff to produce the roll, for the purpose of having the suggestion entered; if he refuse to do so, the court will compel him. *Jones v. Harris*, 1 Dowl. 433.

The following references to cases which have been decided upon statutes relating to the courts of requests, may be found useful:—

Bath: *Axon v. Dallimore*, 3 D. & R. 51. *Baldon v. Pitter*, 3 B. & A. 210. *Hippesley v. Layng*, 4 B. & C. 863. *Meredith v. Drew*, 1 Dowl. 252. *Graham v. Brown*, Id. 309.

Birmingham: *Lees v. Rogers*, 4 Taunt. 150. *Bernard v. Turner*, 1 Mees. & W. 580, S. C. *nom. Turner v. Barnard*, 5 Dowl. 170. *Allen v. Turner*, 2 Dowl. N. C. 21. *Jenks v. Taylor*, 1 Mees. & W. 578.

Blackheath: *Moreau v. Hicks*, 4 Nev. & M. 563. 1 Har. & W. 87. *Moore v. Jones*, 2 Dowl. 58. *Pope et al. v. Banyard*, 3 Mees. & W. 424. *Cross v. Collins*, 5 Bing. N. C. 194.

Bradford: *Drew v. Coles*, 1 Dowl. 580.

Brixton: *Hamley v. Hutton*, 5 Dowl. 382.

Deptford: *Newton v. Peacock*, 1 Dowl. 677.

Derby: *Manfield v. Brearey*, 3 Nev. & M. 471.

Gloucester: *Croad v. Harris*, 1 Har. & W. 657. *Jackman v. Cottur*, 5 Mees. & W. 147, 8 Law J., 223, ex.

Halifax: *Walker v. Watson*, 4 Bing. 414.

Isle of Wight: *Oakes v. Albin*, McClell. 582. *Wittam v. Urry*, 2 Dowl. 543.

London: *Younger v. Wilsby*, 6 Taunt. 452. *Jordan v. Strong*, 5 M. & S. 196. *Horne v. Hughes*, 8 East, 317. *Dunster v. Day*, 8 East, 239. *Board v. Parker*, 7 East, 46. *Sanby v. Miller*, 5 East, 194. *Tucker v. Crosby*, 2 Taunt. 169. *Ward v. Abrahams*, 1 B. & A. 367. *Dillon v. Rimmer*, 1 Bing. 100. *Drew v. Fletcher*, 1 B. & C. 283. *Fomin v. Oswald*, 1 M. & S. 293. *Shaddick v. Bennett*, 4 B. & C. 769. *Waistall v. Atkinson*, 3 Bing. 289. *Brooks v. Moravia*, 2 H. Bl. 220. *Gould v. Collier*, 1 Smith, 324. *Skinner v. Davies*, 2 Taunt. 196. *Croft v. Pitman*, 5 Taunt. 648. *Stephens v. Derry*, 16

East, 147. *Gray v. Cook*, 8 *East*, 336. *Jefferies v. Watts*, 1 *New Rep.* 153. *Kemsett v. West*, 5 *D. & R.* 626. *Jonas v. Greening*, 5 *T. R.* 529. *Webb v. Brown*, 5 *T. R.* 535. *Holden v. Newman*, 13 *East*, 161. *Woolley v. Cloutman*, *Doug.* 244. *Foot v. Coare*, 2 *B. & P.* 588. *Smith v. Hurrell*, 10 *B. & C.* 542. *Reeves v. Stroud*, 1 *Dowl.* 399. *Double v. Gibbs*, 1 *Cr. & M.* 246. *Postan v. Massae*, 2 *Id.* 683. *Rice v. Legh*, 2 *Dowl.* 105. *Crowder v. Bell*, *Id.* 508. *Wettenhall v. Wakefield*, *Id.* 759. *Kidd v. Mason*, 3 *Dowl.* 85, 96. *Bond v. Bailey*, 2 *Cr. M. & R.* 246. *Godson v. Lloyd*, 4 *Dowl.* 157. There has recently been an act of parliament passed (5 & 6 *W. 4*, c. 44), regulating the court of requests for London, which extends its jurisdiction to debts of 10*l.*, but omits altogether that clause which in the previous act deprived plaintiffs of their costs if they sued in the superior courts. See *Bliss v. Johnson*, 1 *Har. & W.* 648.

Middlesex: *Fitzpatrick v. Pickering*, 2 *Wils.* 68. *Hussey v. Jordan*, 1 *Doug.* 382 n. *McCollam v. Carr*, 1 *B. & P.* 223. *Ailway v. Burrows*, 1 *Doug.* 263. *Wace v. Wyburd*, 1 *Doug.* 234, 246. *Wiltshire v. Lloyd*, 1 *Doug.* 366, 381. *Harris v. Lloyd*, 4 *M. & S.* 171. *Chadwick v. Bunning*, 5 *B. & C.* 532. *Nightingale v. Barnard*, 4 *Bing.* 169. *Jones v. Harris*, 1 *Dowl.* 374. *Fossett v. Godfrey*, 2 *Dowl.* 587. *Unwin v. King*, *Id.* 593. *Sandall v. Bennett*, 3 *Dowl.* 294. *Jenkinson v. Morton*, 1 *Mee. & W.* 300. *Bailey v. Chitty*, 2 *Mees. & W.* 28. *Downes v. Ray*, 1 *Har. & W.* 649. *Thorn v. Chinnock*, 1 *Man. & Gr.* 216. *Bishop v. Marsh*, 9 *Law J.*, 98, cp.

Newcastle-upon-Tyne: *Bursby v. Fearon*, 8 *T. R.* 235.

Rochester: *Harsant v. Larkin*, 3 *Brod. & B.* 257.

Sheffield: *R. v. Danser*, 6 *T. R.* 242.

Southwark: *Dillamore v. Capon*, 1 *Bing.* 388. *Spencer v. Holloway*, 15 *East*, 647. *Lawson v. Moggridge*, 1 *Taunt.* 396. *Barney v. Tubb*, 2 *H. Bl.* 350. *Scott v. Bye*, 2 *Bing.* 344. *Clarke v. Askew*, 8 *East*, 28. *Claridge v. Smith*, 4 *Dowl.* 583. *Surrey: Keay v. Rigg*, 1 *B. & P.* 11.

Tower Hamlets: *Per Cur. in Woolley v. Cloutman*, *Doug.* 233, 234. *Defries v. Snell*, 4 *Dowl.* 680. *Green v. Bolton*, 4 *Bing. N. C.* 308. *Elsley v. Kirby*, 1 *Dowl. N. C.* 946.

Westminster: *Taylor v. Blair*, 3 *T. R.* 452. *Clark v. Hamlet*, 1 *Har. & W.* 177. *Burroughs v. Hodgson*, 8 *Law J.*, 113, qb.

2. Upon a verdict for defendant.

A defendant is entitled to costs, in all cases where the plaintiff, if he recovered, would be entitled to them. 4 *Jac.* 1, c. 3, 23 *H. 8*, c. 15, s. 1. *Greetham v. The Hund. of Theale*, 3 *Burr.* 1723. So in actions on penal statutes, by common informers,

dant, if he have a verdict, will be entitled to costs ; 53 ; although the plaintiff would not have been costs had he recovered. *Wilkinson v. Allot, Courp.*

ly, and even after the statute of James above mentioned, if several defendants obtained a verdict, he was not entitled to costs, if the plaintiff had a verdict against the defendants. See *Ingle v. Wordsworth*, 3 Burr. 1284. This was in the case of trespass, assault, false imprisonment, and non est, by stat. 8 & 9 W. 3, c. 11 ; but even in cases of non est, according to the practice of the court of King's Bench, if the defendants pleaded jointly, the costs of acquittal would be taxed at 40s. only. *Hughes v. M. & S.* 172. But now, by stat. 3 & 4 W. 4, c. 42, where several persons shall be made defendants in any action, and any one or more of them, upon the trial or verdict, shall have a verdict pass for him or them, every one shall have judgment for and recover his reasonable costs as the judge, before whom such cause shall be tried, shall certify upon the record, under his hand, that there was no other cause for making such person a defendant in such action. As to what shall be reasonable cause, see *Furneaux v. By*, 4 Camp. 136. *Aaron v. Alexander*, 3 Camp. 35, decided upon stat. 8 & 9 W. 3, c. 11, above mentioned, the present action was substituted ; and see *Hum- Wodehouse*, 1 Bing. N. C. 506. Upon the present statute it has been ruled that in cases within it, where the defendants defend jointly, the one acquitted shall be entitled to 40s. as formerly upon the statute of William, as mentioned, (and which the judges think unjust), but to a proportionate part of the joint costs ; as for instance, if there be three defendants, and two of them obtain a verdict, they shall be entitled to two-thirds ; *Griffith v. Jones*, 2 Cr. M. & R. 333. *Kynaston*, 2 Tyr. 757. *Bartholomew v. Stevens et al.*, 5 Ad. & W. 386. *Gambrell v. Earl of Falmouth*, 5 Ad. & Norman v. Climençon, 1 Dowl. N. C. 718. *Starling et al.*, 2 Cr. M. & R. 445 ; and if the third defendant be found on one count found for him, and that on another count found against him, he will be entitled to have the costs of the issue found for him, deducted from the plaintiff's costs. *Starling v. Cozens, supra.* *Gambrell v. Earl of Falmouth, supra.* If the defendants plead separately, and their defence is conducted *bonâ fide* by separate attorneys, they may make out separate bills of costs ; but if, although their defence is separate, the defence really be joint, the court will order them to do so ; and if there be a doubt upon the matter the court will refer it to the master, to ascertain the proper mode of taxing accordingly. *Nunty v. Kenrick et al.*, 2 Dowl. N. C. 100. When they are *bonâ fide* separate defences, if the

verdict be general, the costs of all the defendants must be taxed at the same time. *Smith v. Campbell*, 6 Bing. 637.

3. Where there are several issues.

Several issues arise, either from there being several counts in the declaration, or from there being several pleas. Where the defendant obtains a verdict upon the issue joined on one of several pleas, if that plea be a defence to the whole action, the defendant will be entitled to the postea, and the general costs of the cause; *Frankum v. Ld. Falmouth*, 4 Dowd. 65. *Edwards v. Bethel*, 1 B. & A. 254. *Staley v. Long*, 3 Bing. N. C. 781. *Mulkins v. Scott*, 5 Id. 423; and this even in an action for the infringement of a patent, notwithstanding stat. 5 & 6 W. 4, c. 83, s. 5. *Loscho v. Hague*, 7 Dowd. 495. So, where the plaintiff had a verdict for 73l. on the general issue, and the defendant had a verdict on issues joined on three special pleas, which covered sums amounting together to 77l.: the court held the defendant to be entitled to the postea, and to the general costs of the cause. *Probert v. Phillips et al.*, 2 Mees. & W. 40. So, where the defendant pleaded a right of way to bring water and goods from a river, and the jury found for the defendant as to the right to bring water, but for the plaintiff as to the alleged right to bring goods: the court held that the defendant had substantially succeeded, and was entitled to the general costs of the cause. *Knight v. Woore*, 3 Bing. N. C. 534. And see *Allenby v. Proudlock*, 5 Nev. & M. 636. In all other cases the plaintiff will be entitled to them. See *Fisher v. Aide*, 3 Mees. & W. 486. It still, however, remains to be considered who are entitled to the costs of the respective issues; and upon this subject, whatever might have been the complexity and difficulty formerly, there are at present two of the new rules, which render the matter plain and intelligible.

By R. G. H. 2 W. 4, s. 74, "no costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for a defendant, shall be deducted from the plaintiff's costs." The meaning of the latter part of this rule is, that the defendant shall be allowed the costs of all issues found for him; for it may happen that the defendant's costs may be very considerable, and the plaintiff's costs, by reason of a certificate entitling him to no more costs than damages, or the like, may be very trifling, so that the costs of the defendant could not be deducted from them; *Milner v. Graham*, 2 Dowd. 422; and the defendant in that case may have his judgment and execution for the amount of them. *Twigg v. Potts*, 4 Dowd. 266. And the costs allowed in such a case to the defendant, even where

he is not entitled to the general costs of the cause, are not merely the costs of the pleadings, but the costs of witnesses, and all other expenses incurred by him in respect of the issues in which he has succeeded. *Doe v. Webber*, 1 *Har. & W.* 10, 4 *Nov. & M.* 381, and see *Ratcliffe v. Hall*, 1 *Gale*, 140. *Eyre v. Thorpe*, 6 *Dowl.* 768. But the expenses of witnesses, who had been brought to prove any of the issues on which the defendant failed, will not be allowed, however necessary they might be also to prove the issues on which he succeeded. *Richards v. Cohen*, 1 *Dowl.* 533. *Lardner v. Dick*, 2 *Cr. & M.* 389. *Crowther v. Elwell*, 4 *Mees. & W.* 71. See *Eades v. Everatt*, 3 *Dowl.* 687. And if the plea upon which he has succeeded, on being submitted for the opinion of the court upon a special case, turn out to be bad, he will not be allowed any costs upon that issue; *Cartwright v. Cook*, 1 *Dowl.* 529; if it turn out to be good, he will be allowed not only the costs of the issue, but the costs of the special case, &c. *Gosbell v. Archer*, 1 *Har. & W.* 559. Where the jury found for the defendant, upon a plea which was an answer to the whole action, and the judge discharged the jury from giving a verdict upon other issues in the action, the defendant, although entitled to the general costs of the cause, was holden to be entitled only to the costs of the issue found for him, and not of the others with respect to which the jury had been discharged. *Vallance v. Evans*, 1 *Cr. & M.* 856, *S. C. nom. Vallance v. Adams*, 2 *Dowl.* 118. On the other hand, although the defendant be entitled to a portion of the general costs of the cause, yet he will be entitled to costs only on the issues found for him; *Mullins v. Scott*, 5 *Bing. N. C.* 423; and the plaintiff to the costs of the issues found for him. Even where the general issue is pleaded, and also special pleas, and the jury find for the defendant on the general issue, but for the plaintiff on the special pleas: although the defendant in that case is entitled to the general costs of the cause, *Empeon v. Fairfax*, 8 *Ad. & El.* 296, yet the plaintiff is entitled to the costs of the issues found for him, and not only to the costs of the pleadings, but of his witnesses, &c., applicable to those pleas, *Hart v. Cutbush*, 2 *Dowl.* 456. *Spencer v. Hamerton*, 6 *Nov. & M.* 23, 1 *Har. & W.* 700. *Skinner v. Shoppee et ux.*, 9 *Law J.*, 96, *cp.*, and see *Wilson v. The River Duss Co.*, 7 *Dowl.* 369, which were not adduced by him to prove his case under the general issue, and to a portion of the briefs and counsels' fees, *Haslewood v. Back*, 9 *Mees. & W.* 1. Where in an action for verbal slander, the jury gave the plaintiff a verdict for 50*l.* on the first count, and 100*l.* on nine other counts; one of which latter counts turning out bad upon error, the plaintiff instead of having a *venire de novo*, agreed to enter a remittitur as to the 100*l.*: it was holden that by remitting the damages on the nine counts, he had waived his right to costs upon them.

also, although there was only one of them bad. *Dann v. Crease*, 2 Dowl. 269. Where there are several counts in the declaration, and the general issue only is pleaded, then there are as many issues as counts, within the meaning of this rule, and the defendant is entitled to the costs of such as are found for him. *Cox v. Thompson*, 1 Dowl. 572. *Knight v. Brown*, Id. 730. So in ejectment, if there be two demises in the declaration, and the jury find for the plaintiff on one, and for the defendant on the other, the defendant is entitled to his costs as to so much as is found for him, within the meaning of this rule. *Doe v. Webber*, 1 Har. & W. 10, 4 Nev. & M. 381. So where there was only one demise, and the action was brought to recover several tenements, the jury having found a verdict of guilty as to some of the tenements, and not guilty as to another, the court held that the defendant was entitled to his costs as to the tenement with respect to which the plaintiff had failed. *Doe v. Errington*, 4 Dowl. 602, 1 Har. & W. 502. So in covenant, if there be several breaches assigned, and special pleas pleaded to each, the defendant will be entitled to the costs of the issues found for him. *Daubuz v. Rickman*, 4 Dowl. 129, 1 Hodg. 75. So, where in trespass for taking goods, the defendant pleaded that they were not the goods of the plaintiff, but the goods of a bankrupt, and justified taking them under a warrant from the commissioners; the jury found a verdict for the plaintiff as to one parcel of the goods, and for the defendant as to another: the court held the plea to be divisible, and that the verdict should be entered distributively for the respective parties, so as to entitle each to the costs of what was found for him. *Routledge v. Abbott et al.*, 8 Ad. & El. 592, and see *Williams et al. v. Great Western Railway Co.*, 8 Mees. & W. 856. *Phytian v. White et al.*, 1 Mees. & W. 216. See also *Delisser v. Towne*, 1 Ad. & El. N. C. 333. But where in an action against a carrier for negligence in carrying fifty casks of tallow and fifty casks of grease, whereby the same were broken and damaged, and the jury found for the defendant as to all except one cask of grease, and for the injury done to that gave 12*l.* damages: the court held that the issue was not distributable, and that the finding was in fact a verdict for the plaintiff only. *Anderson et al. v. Chapman et al.*, 5 Mees. & W. 483. So, where in an action on a bill of exchange, describing it as a bill for 245*l.*, the defendant pleaded that he did not accept, and it appeared that the bill was in the figures for 245*l.*, but in the words in the body of the bill for 200*l.* only, and the court, upon a case reserved, ordered a verdict for 200*l.* to be entered for the plaintiff: the court held the plaintiff to be entitled to all the costs, including the costs of the special case, and that they might amend the record. *Saunderson et al. v. Piper et al.*, 5 Bing. N. C. 561.

recent rule as to pleadings, R. G. H. 4 W. 4, s. 5, counts shall not be allowed, unless a distinct subject-complaint is intended to be established in respect of or shall several pleas or avowries or cognizances be unless a distinct ground of answer or defence is to be established in respect of each." And if more count or plea, &c., be used, in apparent violation of the opposite party may apply to a judge to have it set aside, and the judge shall order accordingly, "unless he is satisfied, upon cause shown, that some distinct subject-complaint is *bond fide* intended to be established in respect of each of such counts, or of some distinct ground of defence in respect of each of such pleas, avowries or cognizances; in which case he shall indorse upon the writ or state in his order, as the case may be, that he is satisfied; and shall also specify the counts, pleas, avowries or cognizances mentioned in such application, which shall be certified. *Id.* s. 6. And where at the trial, there is more than one count or plea, and the party fail to make out a distinct subject-complaint or defence, &c., in respect of each, the court or judge shall pass judgment against him upon each count or plea, &c., which he so fails to establish, "and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry or cognizance, including those of the other party, as well as those of the pleadings;" and in cases where the judge shall make an order, or indorsement on the writ, as above mentioned, if the court or judge before the trial is had, shall be of opinion that no distinct subject-complaint as to each count, or matter of defence as to each plea, &c., was intended to be established, and shall so certify before final judgment, the party pleading "shall not be allowed any costs upon the issue or issues upon which he is failing, arising out of any count, plea, avowry or cognizance, except to which the judge shall so certify." *Id.* s. 7. See *Bell, 2 Dowl. 76. Head v. Baldray, 9 Law J., 221, qb.* application for the certificate, in this latter case, to the judge who tried the cause. *Jackson et al. v. May, 8 Law J., 29, cp.* See *Walker v. Sherwin et al., 1, 33, ex.*

by stat. 4 & 5 Anne c. 16, (which first allowed of demurrer), it is provided by sect. 5, that "if any such demurrer, upon a demurrer joined, be judged insufficient, all be given at the discretion of the court; or if a demurrer shall be found upon any issue in the said cause for which costs shall also be given in like manner, unless the defendant who tried the said issue shall certify that the defendant or plaintiff in replevin, had a probable cause to plead the matter, which upon the said issue shall be found against him." And this statute is not altered or affected by

the rule H. 4, W. 4, above mentioned. *Robinson v. Messenger*, 8 Ad. & El. 606.

4. *Upon nul tiel record, judgment by default, or judgment notwithstanding verdict.*

Nul tiel record.] Upon nul tiel record pleaded, and trial by the record, the party in whose favour the judgment is given, will be entitled to costs, in the same manner as after verdict. If however it be in debt on judgment, the plaintiff, if he have judgment, shall not be entitled to costs, unless the court or a judge thereof shall otherwise order. 43 G. 3, c. 46, s. 4. *See ante*, p. 40. The application for costs in such a case, is made by motion to the court for a rule to show cause, or by summons before a judge at chambers, founded upon an affidavit, stating some satisfactory reason for bringing an action on the judgment; and the rule or summons is afterwards made absolute or discharged, in the usual way.

Judgment by default.] The plaintiff is entitled to his costs, upon a judgment by default, in the same manner as upon a verdict, by the stat. of Gloucester. *See ante*, p. 39. And in actions *ex delicto*, such as trespass, case, &c., if one of two defendants allow judgment to go by default, and the other plead to issue and have a verdict, the defendant who pleaded will be entitled to his costs, as in ordinary cases, *Price v. Harris et al.*, 2 Dougl. 804, and the plaintiff be entitled to his costs against the party who suffered judgment by default. In actions *ex contractu*, such as assumpsit, covenant, &c., if one of two defendants allow judgment to go by default, and the other plead *non assumpsit*, and obtain a verdict, the latter shall be entitled to costs; *Shrubb v. Barrett*, 2 H. Bl. 28; but the plaintiff shall have neither damages nor costs against the defendant who allowed judgment to go by default, because the verdict shows that he had not a joint cause of action against both defendants. And therefore, where in covenant against three, with counts on several deeds, two of the defendants suffered judgment by default, and the third pleaded and had a verdict on some of the counts: the court held that the plaintiff could not retain his judgment as to these latter counts against the defendants who allowed judgment to go by default. *Morgan v. Edwards*, 6 Taunt. 398.

If there be two distinct causes of action in two counts, and the defendant allows judgment to go by default as to one, and pleads to the other and has a verdict, he is entitled to judgment for his costs upon the latter count, although the plaintiff be entitled to judgment and his costs upon the other. *Day v. Hawks*, 3 T. R. 654. *Anon.* 8 T. R. 467, *cit. Per Le Blanc, J.*

ere in trespass the defendant pleads the general issue special plea, and the plaintiff joins issue on the one, sees the other, and new assigns: if the defendant allow ent to go by default as to the new assignment, and saw the general issue, and the plaintiff after that take use down for trial, and there be a verdict for the defend- on the special plea,—the defendant will be entitled to the of the cause, although the plaintiff have damages ed to him on the new assignment. But if, instead of this, the defendant allow the general issue to stand, so force the plaintiff to try the cause, the plaintiff, if he a verdict on the general issue, will be entitled to the of the cause. *Broadburt v. Shaw*, 2 B. & Ad. 940. v. *The Thames Commissioners*, 3 Brod. & B. 117. s v. *Gallimore*, 5 Bing. 196. *Longden v. Bourne*, 1 B. 278. *Forester v. Dale*, 1 Dowd. 412. See *Thornton v. mson*, 13 East, 191. *Griffiths v. Davies*, 8 T. R. 466. the plaintiff in such a case, where the general issue idrawn, instead of proceeding to trial on the issue on ecial plea, enter a *nolle prosequi* as to so much of his ation as is covered by it, and execute a writ of inquiry he new assignment, he will be entitled to the costs only common inquiry. *Ruddock v. Smith*, 1 Dowd. 467. : in an action on the case by a reversioner, the defend- eaded not guilty and a justification; the plaintiff new- ed excess; and the defendant thereupon withdrew his f not guilty, and paid 10s. into court on the new assign- which the plaintiff accepted in satisfaction: the court hat the plaintiff was entitled to the costs of the writ and : new assignment only, the defendant to all the other prior to the new assignment. *Griffiths v. Jones*, 1 Mees. 731, and see *Burn v. Bateman et al.*, 10 Law J., 467, ex.

gment *non obstante veredicto*.] Where the jury find im- al issues for the defendant, and the plaintiff has judg- *non obstante veredicto*, neither party is entitled to the of these issues: not the plaintiff, for they were found t him; and not the defendant, for ultimately he has not ided upon them. *Goodburne v. Bowman*, 2 Dowd. 206, e *Kirk v. Nowell*, 1 T. R. 260. *Da Costa v. Clarke*, 2 B. 176.

5. Upon demurrer, arrest of judgment, error.

nurrer.] By stat. 3 & 4 W. 4, c. 42, s. 34, "where ent shall be given for or against a plaintiff or deman- or for or against a defendant or tenant, upon any de-

murrer joined in any action whatever, the party in whose favour such judgment shall be given, shall also have judgment to recover his costs in that behalf."

Arrest of judgment.] Upon arrest of judgment, each party pays his own costs. *Cameron v. Reynolds, Coup.* 407.

Error.] If judgment for a plaintiff, 3 *H.* 7, c. 10; 13 *C.* 2, st. 2, c. 2, s. 10, or defendant, 8 & 9 *W.* 3, c. 11, s. 2, be affirmed in a court of error, the party succeeding shall have judgment to recover his costs. But if judgment be reversed, each party pays his own costs. *See post*, title "Error."

6. Upon nonpros or nonsuit.

Upon judgment of nonpros, the defendant is entitled to costs, 4 *J.* 1, c. 3. 23 *H.* 8, c. 15. *See Davies v. James*, 1 *T. R.* 371. *Clarke v. Mayor of Berwick*, 4 *B. & C.* 649.

So upon a judgment of nonsuit, the defendant is entitled to costs, 4 *J.* 1, c. 3. *See Cameron v. Reynolds, Coup.* 407, even in *qui tam* actions. *Wilkinson v. Allot, Coup.* 366. Upon a nonsuit, also, the judge at *nisi prius* may now certify for the costs of a special jury, 3 & 4 *W.* 4, c. 42, s. 35, which formerly could not be done.

As to costs upon a *nolle prosequi*, *see* vol. 1, p. 333; as to costs upon payment of money into court, vol. 1, p. 292; costs upon a rule to discontinue, vol. 1, pp. 244, 245.

7. Double and treble costs.

Where a statute gives double or treble damages, in a case where at common law the party would be entitled to single damages, there the plaintiff shall have also double or treble costs, for the costs are in law parcel of the damages; *Deacon v. Morris*, 2 *B. & Ald.* 393; but where a statute gives a party treble damages, with his costs, in a case in which damages were not recoverable at common law, there the damages only, and not the costs, shall be trebled. *Butterton v. Furber*, 1 *Brod. & B.* 517, and *see Charington v. Meatheringham*, 2 *Mees. & W.* 142. Besides this, there were formerly many statutes by which double or treble costs were expressly given. But by stat. 5 & 6 *Vict.* c. 97, s. 1, so much of any clause, enactment or provision in any act, commonly called public, local and personal, or local and personal, or in any act of a local

sonal nature, whereby it is enacted or provided that double or treble costs, or any other than the usual costs party and party, may be recovered,—is now repealed; lieu thereof, the usual costs between party and party recovered, and no more. And so much of any clause, act or provision in any public act, not local or personal, as it is enacted or provided that either double or treble any other than the usual costs between party and party recovered,—is also now repealed; and instead thereof, every heretofore entitled thereto shall receive “such full and complete indemnity as to all costs, charges and expenses incurred in and about any action, suit or other legal proceeding shall be taxed by the proper officer in that behalf, to be reviewed in like manner and by the same authority as other taxation of costs by such officer.” *Id.* s. 2.

The mode of computing double costs, is thus: first the sum of the single costs, including the expenses of witnesses, counsel’s fees, &c., is ascertained, and then one-half of that amount is added to it, and the two sums constitute what are called double costs. *Stainland v. Ludlam*, 4 B. & C. 484. And treble costs are computed in a similar manner: first the single costs, then half, and then a quarter; and the three sums added together, constitute what are termed treble costs. *Hullock*, 484. *Wilson v. The River Dun Navigation*, 10 W. 89. It is only the ordinary costs of the cause, and not such as are thus doubled or trebled; and therefore a plaintiff, upon obtaining an order to change the venue from G. to H., undertook to pay the defendant’s extra costs of the cause in G., and the cause was tried, the defendant was ordered to pay, and was by a statute entitled to double costs: it was held that these extra costs should not be doubled. *v. Saunders*, 3 Nev. & M. 572. See also *Kemp v. Moore*, 2 Moore, 238. The double or treble costs will be allowed if the party have judgment for them as a matter of course upon the face of the record the case appears to be such as to entitle him to them: but if nothing appears upon the face of the record which would entitle the party to such costs, it may be necessary to apply to the court for leave to enter such a suggestion on the roll as may show the party’s title to such costs, and which of course ought to be done before final judgment is given; the record may be afterwards amended by inserting the suggestion. *Collins v. Poney*, 9 East, 322, but see *Wells v. Ody*, 799, 1 Gale, 161. Where a rule nisi was obtained for judgment, and a suggestion for double costs, and it appeared on the return that the double costs had actually been paid to the party, the court discharged the rule with costs. *ie v. Holt*, 4 Dowl. 700.

8. *Taxation of costs.*

By a recent statute, 1 Vict. c. 39, by which the offices of the courts of common law are remodelled, it is enacted by sect. 23, that the masters of the courts of Queen's Bench, Common Pleas, and Exchequer, "are hereby authorised, empowered, and required, subject to such rules and orders as hereinafter mentioned, to tax all bills of costs indiscriminately, which shall have arisen, or may arise in cases of a civil nature, in any of the said courts, or in the court of error in the Exchequer Chamber, although such costs may not have arisen in respect of business done in the court to which such masters may belong; and the judges of the said courts, or any eight or more of them, of whom the chiefs of each of the said courts shall be three, shall and they are hereby required, by any rule or order to be from time to time made, either in term or vacation, to establish such regulations as may be necessary for the purpose of enforcing uniformity of practice in the allowance of costs in the common law courts, and of insuring, as far as may be practicable, an equal division of the business of taxation, amongst the masters of the said courts; and such judges shall appoint some convenient place in which the said business of taxation shall be transacted for all the said courts."

Notice of taxation, &c.] "Before taxation of costs, one day's notice shall be given to the opposite party;" *R. G. T. 1 W. 4, s. 12*; that is to say, a notice delivered at any time before nine o'clock at night, for a taxation on the next day. *Edmunds v. Cates, 4 Mees. & W. 66*. But "notice of taxing costs, shall not be necessary in any case, where the defendant has not appeared in person, or by his attorney or guardian." *R. G. H. 4 W. 4, r. 1, s. 17. Pope v. Mann, 2 Mees. & W. 881*. Also where a cognovit is given in a sum certain, for the amount of debt and costs, it is not necessary, in signing judgment, to give a notice of taxing costs: for as to the costs of the action, they are already fixed at a certain sum; and as to the costs of signing judgment, a fixed sum is always marked, without taxation. *Griffiths v. Liversedge, 2 Dowl. 143. Clark v. Jones, 3 Dowl. 277*. And in cases within the rule, if notice to tax be not given, it is no ground for setting aside the judgment and execution: all the court will do, will be to refer it to the master to retax the bill; and if upon taxation there be any reduction of the amount, they will make the party whose costs are taxed pay the costs of the rule; or if nothing be taxed off, then the court will not allow costs on either side. *Lloyd v. Kent, 5 Dowl. 125, 2 Har. & W. 130*. The notice in

term time may be to tax at Westminster, if the master require it. *Blake v. Warren*, 6 *Mees. & W.* 151.

In the Exchequer, also, "in taxing costs upon rules, orders, town postea and inquisitions, a copy of the bill of costs and of the affidavit of increase, shall be given to the opposite party, one day previous to the taxation, and in the cases of postea and inquisitions in country causes, two days before such taxation." *R. M.* 1 *W.* 4, s. 10. See *Todd v. Fellingham*, 9 *Law J.*, 184, *ex.* This rule is imperative; and if the costs be taxed without a delivery of the copy of the bill and affidavit, the taxation will be set aside for irregularity; *Wilkins v. Perkins*, 2 *Mees. & W.* 815, *S. C. nom. Wilson v. Perkins*, 5 *Dowl.* 461; but it is no ground for setting aside the judgment or execution. *Taylor v. Murray*, 3 *Mees. & W.* 141. Nor does the rule apply, where the defendant has not appeared. *Burch v. Pointer*, 3 *Mees. & W.* 310.

By *R. G. H.* 2 *W.* 4, s. 92, "one appointment only shall be deemed necessary, for proceeding in the taxation of costs, or of an attorney's bill." And where a regular judgment of *non-pro* was set aside upon payment of costs, and the defendant's attorney refused to attend a peremptory appointment to tax, it was holden that the master might tax them at the nominal sum of *8s. 4d.*; on tender of which, the plaintiff was entitled to treat the judgment as set aside, and to proceed to trial. *Christie v. Thompson*, 1 *Dowl. N. C.* 592.

What costs allowed, generally.] There are two modes of taxing costs: taxing them as between party and party, in which case none but the costs of the action can be included; and taxing them as between attorney and client, in which case not only the costs of prosecuting or defending actions are included, but also charges for attendances, letters, consultations, &c., and for all disbursements made by the attorney on account of the client. Costs between party and party must be taxed, unless where, upon a compromise, a sum certain is agreed to be paid for costs. Costs between attorney and client may be taxed, if the client wish it; and if one-sixth be taxed off, the attorney will have to pay the costs of taxation. *Id.*, vol. 1, p. 86. Or if upon a compromise of an action between A. & B., A. agree to pay B.'s costs as between attorney and client, A. is entitled to have the costs taxed; and if upon taxation more than a sixth be taken off, the attorney is liable for the costs of taxation. *Sadler v. Palfreyman*, 3 *New. & M.* 599.

In taxing between attorney and client, the attorney is to be allowed for all disbursements actually made; and for all business actually done, except such as was wholly unnecessary, or which from the negligence or ignorance of the attorney, turned out to be wholly useless to the client. Where an

attorney, being instructed by an administratrix to bring an action against a tenant for rent, brought assumpsit for use and occupation, without previously inquiring whether the holding was or was not by deed; and upon its afterwards appearing to have been by deed, he was obliged to discontinue the action of assumpsit and bring another action; and in taxing his bill as between attorney and client, the master allowed his costs in both actions: the court ordered the master to review his taxation, leaving the attorney to bring his action for the other costs, if he would. *Cliffe v. Prosser*, 2 Dowl. 21, and see *Morris v. Parkinson*, 3 Dowl. 744, but see *Matchett v. Parkes*, 11 Law J., 287, *ex.* So, where a defendant gave a cognovit to the plaintiff's attorney for debt and costs, payable on a certain day; on that day the attorney wrote to him requiring payment, to which the defendant answered that he had tendered the money to the plaintiff, who refused to receive it; the attorney notwithstanding in a few days afterwards signed judgment and issued execution, which however the court upon application set aside with costs to be paid by the plaintiff, and which costs the attorney paid, and charged them to his client: the attorney having brought an action, for the amount of his bill, it was referred for taxation, and the master disallowed both the sum so paid, and the costs of the judgment and execution; but this being objected to, *Patteson, J.*, held that although the attorney had a right to the opinion of a jury as to the disbursement, the master had a right to disallow the other items as being unnecessary. *Heald v. Hall*, 2 Dowl. 163. See *Jones v. Roberts*, *Id.* 656. Where the master disallowed certain costs on taxation between party and party, as being unnecessarily incurred; and the attorney afterwards sued his client for the same costs, and the master, on taxing his bill, again disallowed them: the court refused to inquire into the propriety of the master's decision. *Nichols v. Williams*, 11 Law J., 190, *qb.* Where upon taxation, it was proved by affidavit that the attorney had agreed to do the business for costs out of pocket, and the officer taxed the costs upon that principle, *Bayley, B.*, held that in strictness the officer had no authority to do so, and ordered the taxation to be reviewed. *Evans v. Taylor*, 2 Dowl. 349. But it is no objection to the allowance of costs between attorney and client, that the attorney at the time he did the business was uncertificated, if it appear that before the 15th of the November following he obtained his certificate. *Bowler v. Brown*, 4 Nev. & M. 17, 3 Dowl. 18; and see *Skirrow v. Tagg*, 5 M. & S. 281. *Coren v. Sharp*, 1 B. & Ad. 386. *Middleton v. Chambers*, 1 Man. & Gr. 97. So, if the costs be due to two attorneys in partnership, the master has no authority to disallow items on taxation, on the ground that one of them

certificated at the time the business was done. *Mat-Parke*, 11 *Law J.*, 287, *ex.*

king costs between party and party, the master also allow charges for any part of the proceedings which are unnecessary. In an action where there were several issues in fact, and a demurrer to a rejoinder, the defendant was ordered to amend upon payment of costs; and upon taxation of the costs, the demurrer books and briefs were disallowed for as containing all the issues in fact as well as the law; the master however disallowed the charges relating to the issues in fact: and the court held that he was right. *Jones v. Roberts*, 2 *Dowl.* 374. So, in an order for the amount of a bill of costs, the bill of course previously delivered, and only the common particulars included with the declaration, the defendant obtained a better bill of particulars upon payment of costs; the attorney upon redelivery of his bill, and charged both for the bill and copying: but the master disallowed the charge for drawing, and the court held that he was right in doing so.

And in an action on an award, where there were several counts, and there was a verdict of course upon one, but the master allowed the plaintiff the costs of the action, the court ordered the master to review his taxation. *Ward v. Bell*, 3 *Dowl.* 76. Also where a rule nisi has been obtained to stay or set aside proceedings upon payment of costs, if the plaintiff, in showing cause, put in long unnecessary affidavits, in answer to the defendant's affidavit of defence, the court upon application will order the master not to tax upon taxation such parts of the affidavits as are unnecessary. *Heane v. Batterby*, 3 *Dowl.* 218, and see *Lewis v. Ryck*, *Id.* 692. But the master has been helden justified in allowing the charges for two writs against the defendant into different counties, where it was doubtful in which county he was to be found. *Morris v. Hunt*, 1 *Chit.* 544.

The master, in a taxation between party and party, will allow all the regular proceedings in the cause. He will allow charges which may be deemed costs in the cause. As to what are to be deemed costs in the cause: if a cause is brought down for trial, and from the pressure of business, or necessity of *actu juratorum*, it be made a remanet, the expenses at assizes or sittings are costs in the cause, and the party who succeeds shall be entitled to them. *Standen v. Ld. Ken.* 338. *Sparrow v. Turner*, 2 *Wils.* 366, and *Mountcharles v. York*, 1 *Ld. Ken.* 341. If a rule in the cause be discharged or made absolute without any mention of costs, the party succeeding upon it also succeeds in the cause, his costs of the rule will be costs in the cause. See *v. Ray*, 4 *Dowl.* 1, 1 *Har. & W.* 233. Thus, the costs

of opposing an unsuccessful application for a new trial, are costs in the cause. *Eyre v. Thorpe*, 6 *Dowl.* 768. *And See Delisser v. Towne*, 1 *Ad. & El. N. C.* 333. But if the rule be merely collateral to the action, as if it be a rule to discharge the defendant upon entering a common appearance, the costs are never taxed as costs in the cause. *Mummery v. Campbell*, 2 *Dowl.* 798. And in the Common Pleas, a person who partly succeeds, and partly fails upon a rule in the cause, shall not have the costs taxed to him, although he succeed in the action. *M'Andrew v. Adams*, 3 *Dowl.* 120. Or if a rule call upon a party and his attorney to show cause, and the attorney show cause, and the rule be discharged without mention of costs, the attorney's costs cannot be deemed costs in the cause. *Southee v. Terry*, 2 *Dowl.* 522. So, if a rule be discharged or made absolute expressly "without costs," the costs of the rule can never afterwards be deemed costs in the cause; or if discharged or made absolute with costs, although the costs in that case are no doubt costs in the cause, yet as the law gives a separate remedy for them by attachment, that remedy in practice is always resorted to, instead of waiting the event of the cause, and then including those costs in the judgment. Also, the costs of every rule or order for the examination of witnesses under any commission or otherwise, by virtue of stat. 1 W. 4, c. 22, shall be costs in the cause, unless otherwise ordered, either by the judge, who shall make the rule or order, or by the judge who tries the cause. 1 W. 4, c. 22, s. 9. See *Prince v. Samo*, 4 *Dowl.* 5. But where a rule is granted on payment of costs, and the party, instead of paying the costs, chooses to abandon the rule, these costs are not costs in the cause. *Pugh v. Kerr*, 9 *Law J.*, 255, *ex.*, 8 *Dowl.* 218.

As to the costs of a new trial, see *ante*, p. 19.

Expenses of witnesses, proofs, &c.] It is usually, however, with the costs of getting up evidence, the expenses of witnesses, and matters relating to them, that the masters have most trouble; and the courts give them an almost unlimited discretion upon these subjects. In town causes, witnesses residing within the bills of mortality, are only paid one shilling each, and the masters allow only that sum in costs; but for country witnesses attending in town causes, they allow in the same proportion as they do for witnesses in country causes. In country causes, the masters allow such reasonable sums as shall have been actually expended (*see Radcliffe v. Hall*, 3 *Dowl.* 802) for the travelling expenses of the witnesses to and from the assize town, (not exceeding at the rate of one shilling a mile, unless under special circumstances, *Direction H.* 1834,) and their maintenance during their necessary stay there.

the witnesses were brought to the assize town on the Monday, and remained there until Saturday, the cause was tried, it was objected afterwards that the master had allowed for their expenses during all that time, but the court held that he had done rightly, if it appeared to him that the party had acted *bond fide* in having their witnesses early at the assizes; it was a question entirely for the consideration of the master. *Platt v. Greene*, 3 Dowl. 191. And in a special jury case, under the same circumstances, Parke, J., said, that there was always so much uncertainty as to the time at which special jury causes would be brought on circuit, that an attorney would not be doing wrong to his client, if he had not his witnesses in attendance on the first day of the assizes. *Cosgrave v. Evans*, 3 Dowl. 191. Even where a plaintiff gave notice to the defendant that the cause would not be tried before a certain day, and the defendant should object upon taxation if his witnesses were not brought to the assize town, sooner than should be necessary on that day, at the same time undertaking to witness the record if the cause should be called on sooner; and notwithstanding this notice, the defendant had his witnesses brought to the assize town, some of them four days, some a week before the time, and the master allowed their expenses accordingly: the court held that he had done rightly, and did not doubt whether the defendant was bound to pay in regard to such a notice. *Thomas v. Saunders*, 3 M. & W. 572. And the fact of the witnesses having been sworn and paid by the opposite party, without the objection of the party taxing, *Benson v. Schneider*, 7 Taunt. 191, having been one of the same firm with the party's name on record, *Butler v. Hobson*, 5 Bing. N. C. 128. *v. Bacon*, Id. 246. *Archer v. Marsh*, Id. 541, or of being sworn merely to translate and explain ancient records, *Bastard v. Smith*, 10 Ad. & El. 213, makes no difference.

In the case of foreign witnesses, the masters are very liberal in their allowance for their conveyance to the assize town, their maintenance here according to their rank, and their conveyance back to their own country, and a liberal allowance for their loss of time, if in a situation to be tried; *Tremain v. Barrett*, 6 Taunt. 88. *Loneragan v. Exchange Assurance Co.*, 7 Bing. 731, 736, 1 Dowl. 223. *Simel v. Lousada*, 4 Taunt. 695, and see *Moore v. Adam*, 9. 156; and the late stat. 1 W. 4, c. 24, relative to the examination of witnesses abroad, under a commission from the courts in this country, makes no alteration in this but the expenses of bringing foreign witnesses to this country, &c., are still in the discretion of the masters. *M'Alpine v. Poles*, 1 Cr. & M. 795, S. C. nom. *M'Alpine v. Coles*, 229. So the like expenses have been allowed for the

captain of a merchant ship, detained as a witness country until a cause was tried, *Berry v. Pratt*, 1 B. 8. *Temperley v. Scott*, 8 Bing. 392, and until a rule for trial was disposed of, *Mount v. Larkins*, 1 Dowl. 262, that a charge for money paid to him for loss of time, allowed. *White v. Brazier*, 3 Dowl. 449. And in other cases the master will not allow charges for loss of time. *Hullusson v. Staples*, 2 Doug. 438. *Lopes v. I*, 3 Brod. & B. 292. *Severn v. Olive*, 3 Brod. & B. 72, attorneys, medical men, *per Cur.* in *Moore v. Adam*, 5 156, and officers of the different courts. *Butall v. S*, *Ad. & El.* 163. *Bastard v. Smith*, *Id.* 213. And the law will thus allow the expenses of witnesses, in all cases where there appears to have been a reasonable ground for their testimony would be admissible, *Rushforth v. I*, 1 B. & C. 267. *Curling v. Fitzgerald*, 9 Dowl. 3. *nom.* *Curling v. Evans*, 10 Law J., 113, *cp.* And see *inson v. Allcock*, 1 D. & R. 165, and where their testimony was reasonably and *bonâ fide* thought to be necessary, see *v. Thornton*, 8 Bing. 431, but see *Skelton v. Steward*, 411, *Marshall v. Parsons*, 9 Dowl. 251, even although they were not actually examined at the trial, *Bagnall v. Un*, 11 Price, 511. *Adamson v. Noel*, 2 Chit. 200. 1 *Schneider*, 7 Taunt. 337. *Webb v. Tripp*, 11 Law J., *Miller v. Thompson*, *Id.* 224, *cp.* *Paddock v. Forrester*, N. C. 125, provided that their evidence, if given, would support some issue in the cause. *Jones v. Tobin*, N. C. 123. Where after issue joined, notice of trial and the plaintiff's witnesses subpoenaed, the pleading altered, so as to render the attendance of some of the witnesses unnecessary, and there was time to stop the attendance of such witnesses, but it was not done, it was holden that the expenses of such witnesses should not be allowed to the plaintiff on taxation. *Allport v. Baldwin*, 2 Dowl. 599. If a party objected to the evidence of witnesses, on the ground of their not being competent, and they were accordingly excluded, it was holden that he was not entitled to the costs of such witnesses who had been in attendance for him to rebut such objection. *Fisher v. Berrul*, 11 Law J., 130, *qb.* Also the ex

of examining them in foreign countries, or upon interrogatories in this country, are costs in the cause, unless otherwise ordered by the court or judge, or by the judge who tries the cause. *Id.* s. 9. See *Muller v. Hartshorne*, 3 B. & P. 556. *Cornet v. Dempsey*, 1 Dowl. N. C. 422.

The master has allowed, and the court have sanctioned the allowance of, successful searches for pedigree; *Johnson v. Lawson*, 2 Bing. 341; the necessary expenses of taking copies and translations of old records, &c.; *Bastard v. Smith*, 10 Ad. & El. 213; the expenses of plans made for the information of the court and jury at the trial of a cause relating to a water-course; *Holmes v. Holmes*, 2 Bing. 75; the postage of foreign letters sworn to be applicable to the cause alone, and translations of so many of them as related to the issue on which the verdict was taken. *Lopes v. De Tastet*, 3 Brod. & B. 292. But the court will not allow the expense of searching for a subscribing witness; *Laing v. Bowes*, 3 M. & S. 89; nor the expense of chemical experiments, necessary to enable scientific and professional men to give evidence in a cause; *Severn v. Olive*, 3 Brod. & B. 72; nor the expenses of surveys, to qualify witnesses to give their evidence. *May v. Selby*, 11 Law J., 223, *cp.*, 1 Dowl. N. C. 708. As to the costs of a special case, see *Garland v. Jekyll*, 2 Bing. 380. *Collins v. Gwynore*, 4 Dowl. 122. *Gosbell v. Archer*, 5 Nev. & M. 523; and as to the taxation of costs, where there are several issues, see *ante*, p. 58.

Where a bill of exchange, drawn and accepted in London, became due after Trinity term, and the holder commenced an action upon it, but for the purpose of having it tried speedily he laid his venue in Surrey; and the prothonotary on that account, taxed him only such costs as he would be entitled to if he had tried his cause in London: the court, after inquiry, said that according to the practice of the other two courts, no such distinction was made; and they accordingly ordered the taxation to be reviewed. *Vere v. More*, 3 Bing. N. C. 261.

Costs of special jury.] If the cause be tried by a special jury, and the party succeed who moved for it, he will be allowed the costs of it only in case the judge grant him a certificate that it was a proper cause to be tried by a special jury. *Ante*, vol. 1, p. 368. But if the successful party have to pay the special jury of his opponent, he is entitled to be allowed for it in costs, although no certificate have been granted. *Jones v. Tobin*, 4 Bing. N. C. 123.

Fees to counsel.] As to counsel's fees, a good deal is left to the discretion of the master. But where the master would

only allow the fees to one counsel for a defendant, in a case at nisi prius that was intended to be strongly contested, but where at the trial the parties agreed upon the facts, subject to the opinion of the court upon a point of law: *Patteson, J.*, held, that however unwilling he might be to interfere with the discretion of the master in matters of this kind, yet judging of the case as it appeared before the trial, he thought the attorney warranted in delivering two briefs, and that they ought to be allowed. *Grindall v. Goodman*, 5 Dowl. 378. *S. P. Maddison v. Bacon*, 5 Bing. N. C. 246.

No fee to counsel to be allowed on writs of trial, except in trials before the judge of the sheriff's court of London, or of other courts of record where attorney's are not allowed to practice, and then one guinea only. *Directions Tax*, H. 1834.

The fees to be allowed to counsel's clerks not to exceed as under:—*Id.*

	s.	d.
Upon a fee under ten guineas - - - -	2	6
Ten guineas and under twenty guineas - - - -	5	0
Twenty guineas and upwards - - - -	10	0
Senior counsel's clerks on consultation - - - -	7	6
The other counsel's clerks, each - - - -	2	6
Attending as a witness at trials to prove documents - -	10	0

Table of costs, in causes not exceeding 20l.

In Hilary vacation, 1834, the judges gave certain directions to their taxing officers, of which the following is a copy:—

In all actions of assumpsit, debt, or covenant, where the sum recovered, or paid into court and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed twenty pounds without costs, the plaintiff's costs shall be taxed according to the reduced scale hereunto annexed. Provided that in case of a trial before a judge of one of the superior courts, or judge of assize, if the judge shall certify on the postea that the cause was proper to be tried before him, and not before a sheriff or judge of an inferior court, the costs shall be taxed upon the usual scale. [The words "in case of a trial before a judge," mean, where a cause is brought down for trial before a judge, and not that it must be wholly tried by him: and therefore where a cause was called on at the assizes, and a verdict taken subject to a reference to a barrister, who was to certify the amount for which the verdict was to be entered; and he gave a certificate for 2l. 10s. and the verdict was entered accordingly; an application being then made to the judge, to certify that it was a proper cause to try before a judge, he

an application to the arbitrator, who certified to that it was, and the judge certified accordingly: *J.*, held this to be regular. *Nokes v. Fraser*, 3 9. This certificate may be given at any time. *Young*, 5 *Dowl.* 450. *Broggref v. Hawke*, 3 *Bing.* 1, see *Atley v. Jay*, 8 *Law J.*, 104, *qb.* *Southwell* 7 *Dowl.* 557. As to what cases are within the of these directions: it has been holden that where paid into court, and a sum under 20*l.* recovered t, but both sums together amounting to more than case is not within these directions, and the party l to full costs. *Masters v. Tichler*, 2 *Har. & W.* 81. e the debt due to the plaintiff was 26*l.*, and the had a cross demand for 9*l.*, leaving a balance of to the plaintiff, the plaintiff commenced his action 6*l.*, and the defendant pleading a plea which was judgment was signed for the full amount; but the eing then informed of the cross demand, deducted nd sued out execution for 28*l.* only, that is to say, ie debt and 6*l.* the taxed costs: the court (*Patteson*, eld that in this case the costs should have been n the reduced scale here mentioned. *Savage v.* 5 *Dowl.* 385. And the same where the amount of t was reduced by proof of a tender, *Dixon v. Walker*, *W.* 214, or plea of payment. *Fewster v. Boggett*, 9 And the same, where proceedings are stayed upon f a less sum than 20*l.* *Cook v. Hunt*, 8 *Law J.*, 216, s. & *W.* 161. Where a cause was referred, and no ken, but the successful party was to be at liberty to udgment as if there had been a verdict, the award er 20*l.*, it was holden that the costs between party were to be taxed on this lower scale; *Walker v. Mees. & W.* 138; but the master was not bound to axing the same costs afterwards as between attorney . *Walker v. Smith*, 5 *Id.* 159. Where in covenant pairing, there was judgment by default, and upon inquiry the damages were assessed at 15*l.*, and the ed the costs upon this reduced scale: the plaintiff ied for a rule to review the taxation, and the court hat these directions did not apply to writs of int finding upon inquiry, that it was the practice of to tax costs upon inquiries on this reduced scale, : damages were under 20*l.*, they refused the rule. *Leigh*, 5 *Dowl.* 40, 2 *Hodg.* 107. It has since, een decided that the master in such a case has no ax upon the lower scale. *Craft v. Miller*, 3 *Bing.*

head of every bill of costs taken to the taxing be taxed, it shall be stated whether the sum reco-

vered, accepted or agreed to be paid, exceeds the sum of twenty pounds or not, in the following form :—

Debt above 20*l*.

Debt 20*l*. or under.

SCHEDULE I.

Commencement of suit.

	£	s.	d.
Letter before action (if sent)*	0	2	0
Instructions to sue	0	3	4
Writ	0	10	0
Copy and service	0	5	0
Bill and copy to indorse	0	2	0
Searching for appearance	0	3	4
Instructions for declaration	0	3	4
Drawing same at 1 <i>s</i> . per folio (folio 6)	0	6	0
Engrossing	0	2	0
Notice thereof (when filed)	0	5	0
Drawing particulars and copy	0	2	6
Rule to plead	0	1	0
Demanding plea	0	3	0
Drawing issue, of whatever length	0	3	4
Engrossing issue to deliver at 4 <i>d</i> . per folio (10 folio)	0	3	4
Notice of trial	0	2	0

SCHEDULE II.

When the cause is tried before the sheriff.

Summons for trial	0	1	0
Copy and service	0	3	0
Attending for order	0	3	4
Paid order	0	1	0
Copy and service	0	3	0
Engrossing the writ of trial (folio 14)	0	4	8
Parchment	0	3	0
Paid sealing	0	0	7
Attending thereon	0	3	4
Copy particulars, to annex	0	2	0
Subpœna	0	5	0
Copy and service	0	3	0
Making minutes of evidence for the hearing	0	13	4

* And he will only be allowed for one letter. *Capel v. Staines*, 2 *Mess. & W.* 880. See *Kirton v. Braithwaite*, 1 *Id.* 310.

	£	s.	d.
ing to enter the cause	-	-	-
t of the sheriff's fee on leaving the same	-	0	4
<i>are to be paid if the record be withdrawn before trial.)</i>			
ing court on trial	-	0	13
% of fees of trial	-	1	4
f taxing	-	0	3
of increase	-	0	5
ing affidavit (whether town or country)	-	0	1
ests and copies	-	0	4
ing taxing	-	0	3
ing (in Q. B. and Exchequer)	-	0	2
judgment	-	0	3
on roll at 4d. per folio.	-	0	0
ries (as before).	-	0	10
gment fee and docket (as before).	-	-	-
ig thereon	-	0	3
!	-	0	10

Letters in country cause.

nder 50 miles	-	-	-
bove 50 miles	-	-	-
bove 100 miles	-	-	-

Where ft. fa. and warrant thereon; viz.

n town	-	-	-
n country	-	-	-

SCHEDULE III.

*When cause is tried at nisi prius, and verdict
for 20l. or under.*

ng record (folio 14)	-	-	-
nt	-	-	-
ling	-	-	-
ig thereon	-	-	-
rticulars to annex	-	-	-
-	-	-	-
urn	-	-	-
ig thereon	-	-	-
as	-	-	-
urn (about)	-	-	-
ig thereon	-	-	-

	£	s.	d.
Subpoena - - - - -	-	0	5 0
Copy and service - - - - -	0	3	0
Instructions for brief - - - - -	0	13	4
Brief and copy (and no more) - - - - -	-	2	0 0
Attending to enter cause - - - - -	0	3	4
Paid entering (about) - - - - -	0	18	0
Counsel (as usual)			
Attending court on trial - - - - -	1	1	0
Paid fees on trial (about) - - - - -	3	15	0
Postea - - - - -	0	5	0
Notice of taxing - - - - -	0	3	0
Affidavit of increase - - - - -	0	5	0
Paid filing same - - - - -	0	1	0
Bill of costs and copy - - - - -	0	4	0
Attending taxing - - - - -	0	3	4
Paid taxing (in Q. B. and Exchequer) as usual, say	0	4	0
Drawing judgment - - - - -	0	3	4
Entering on roll at 4d. about 19 fo.			
Paid roll - - - - -	0	0	10
Paid judgment fee and docket - - - - -	-	-	-
Attending thereon - - - - -	0	3	4
Term fee - - - - -	0	10	0

"Letters in country (as to distance).

"Costs not to be taxed until judgment signed, unless the parties compromise without judgment.

"Where fi. fa. and warrant (as before)."

(Signed by the judges).

Table of costs in all cases, as well above as under 20l.

On the 1st January, 1838, the judges of the different courts gave the following directions to their taxing officers.

In all actions commenced upon or after this day—and in all actions previously commenced in which further proceedings shall be taken—the masters, on the taxation of costs, will allow as follows;—

PLAINTIFF'S COSTS.

	In cases above £20.		£20 and under.	
	£	s.	£	d.
Instructions to prosecute - - - - -	-	-	as usual.	as usual.
Affidavit of debt - - - - -	-	-	ditto.	ditto.
Summons, capias, or detainer - - - - -	0	14 6	0	12 6
Alias or pluries - - - - -	0	12 0	0	10 0

Costs.

79

Arrest.

	£ s. d.	£ s. d.
	In cases above £20.	£20 and under.
aid for warrant in London and Middlesex - - - - -	0 2 6	
aid for warrant in other counties not exceeding 100 miles from London -	0 5 0	
aid for warrant, not exceeding 200 miles - - - - -	0 6 0	
aid for warrant, exceeding 200 miles -	0 7 0	
attending to procure same - - - -	0 3 4	
attending to instruct officer (<i>as usual</i>) -	0 3 4	
aid caption fee - - - - -		

Detainer.

aid lodging same and attending - *as usual*.

Service of summons or capias.

Copy service - - - - -	<i>as usual.</i>	-	<i>as usual.</i>
Affidavit of service - - - - -	<i>ditto.</i>	-	<i>ditto.</i>
Appearance, sec. stat. - - - - -	0 7 6	-	0 6 0

Declaration.

Where case within printed directions to taxing-officers — March, 1834 — instructions, &c., &c. - - - -	1 18 0*	<i>Instructions & actual length as usual.</i>
--	---------	---

Judgment by default.

Where case within the above printed directions—instead of the 1 <i>l.</i> 11 <i>s.</i> 4 <i>d.</i> there mentioned (including rule to plead 2 <i>s.</i>) - - - - -	1 3 2	<i>actual length as usual.</i>
(exclusive of demand of plea, if made.)		Rule to plead, 1 <i>s.</i> 6 <i>d.</i>
aid signing judgment - - - - -		
filers and docket - - - - -	0 4 0	- 0 4 0
tending to sign judgment - - - - -	0 3 4	- 0 3 4

This, it seems, does not extend to cases where more than one action is brought on a bill of exchange or note; but the master in such case is to allow, according to the length of the declaration. *Cripps Field, 8 Mees. & W. 659.*

*Costs.**Issue.*

	In cases above £20.			£20 and under.		
	£	s.	d.	£	s.	d.
Paid entering - - - -	-	-	-	-	-	-
Attending - - - -	0	3	4	0	3	4
Ushers and docket - - -	0	4	0	0	4	0

Record.

Ingrossing, &c., and fee on passing	-	as usual.	-	as usual.
Venire - - - -	0	6	0	0
Distringas - - - -	0	7	0	0

<i>Writ of trial.</i>	Where less than 20l. recovered at nisi prius.
If of common length - - - -	0 14 0

Subpœna.

Subpœna before judge - - -	0 7 0
Subpœna before sheriff, or where less than 20l. recovered at nisi prius -	0 5 0

Final judgment—Taxing costs, &c.

Attending to sign final judgment <i>pre-</i> <i>viously</i> to taxing costs on posteaas, writs of trial, writs of inquiry, and rules to compute - - - -	0	3	4	0	3	4
Attending taxing - - - -	<i>as usual.</i>					
Attending at Westminster to get final judgment entered on roll - - -	0	3	4	0	3	4
Fee to officer abolished.						
Fi. fa. or ca. sa. - - - -	0	8	0	0	7	0
Paid for warrant - - - -						
Attending for same - - - -	0	3	4	0	3	4
Attending to instruct officer - - -	0	3	4	0	3	4
Term fee and letters - - - -	<i>as usual.</i>					

DEFENDANT'S COSTS.

Instructions to defend - - -	as usual.	as usual.
------------------------------	-----------	-----------

Special bail.

Bail-piece—Affidavits, attendances ex- clusive of fees paid - - -	<i>as usual.</i>
--	------------------

Costs.

81

Bail bond.

paid pursuant to the sheriff's

Appearance.

	In cases above £20.			£20 and under.		
	£	s.	d.	£	s.	d.
and fee - - - -	0	7	0	0	6	0
thereof, copy and service - -	0	4	0	0	3	0
; for declaration - - - -	<i>as usual.</i>			<i>as usual.</i>		
ing declaration out of the office	Nil.			Nil.		
s for time to plead—Copy and						
in term - - - -	0	4	0	0	4	0
s for time to plead—Copy and						
in vacation - - - -	0	5	0	0	5	0
; - - - -	0	3	4	0	3	4
py and service in term - -	0	4	0	0	4	0
py and service, in vacation -	0	5	0	0	5	0
; to sign judgment of non pros	0	3	4	0	3	4
id docket - - - -	0	4	0	0	4	0
; to enter issue where <i>not</i> done						
ntiff - - - -	0	3	4	0	3	4
i docket - - - -	0	4	0	0	4	0

Trial, &c.

- - - -	0	7	0	0	5	0
; to sign final judgment on						
or writ of trial - - - -	0	3	4	0	3	4
; taxing costs - - - -	<i>as usual.</i>			<i>as usual.</i>		
; to get final judgment entered						
- - - -	0	3	4	0	3	4
; fee to <i>officer</i> abolished.						
ca. sa. - - - -	0	8	0	0	7	0
varrant - - - -						
; for same - - - -	0	3	4	0	3	4
; to instruct officer - - - -	0	3	4	0	3	4

Prisoners.

gs by - - - -	Nil.	Nil.
---------------	------	------

Money into court.

; to pay money into court -	0	6	8	0	3	4
; to take it out of court -	0	10	0	0	6	8

Every brief sheet to contain eight folios at the least, which are to be paid for at the rate of 6s. 8d. per sheet for drawing and 3s. 4d. copying. *Directions. Tax, H. 1834.*

Note.—For all other matters the usual fees, attendances, &c., in addition to what actually paid.

As to the fees paid to the officers of the court, see vol. 1, pp. 11—19.

As to fees paid to sheriffs and their officers, see vol. 1, p. 23.

Motion to review the taxation.] The court will not, in the first instance, lay down the principle upon which the master should tax in any particular tax; the master must tax first, and if either party be dissatisfied with the taxation, he may move the court that the master should review it. *Head v. Baldrey*, 8 *Ad. & El.* 605. Nor will the court in general entertain this application, unless they see clearly that the master has come to a wrong conclusion. *Rennie v. Mills*, 8 *Law J.*, 148, *cp.* The motion is for a rule to show cause why the master should not review his taxation. It is founded upon an affidavit showing the items objected to, and the grounds of objection. *Aliven v. Furnival*, 2 *Dowl.* 49. *Daniel v. Bishop*, *M'Cl.* 61. It must also show that the master has made his *allocatur*, for until the master has done so, his taxation cannot be reviewed. *Cleaver v. Hargrave*, 2 *Dowl.* 689. *Sellman v. Boorn*, 8 *Mees. & W.* 552. If the court make the rule absolute, they never do so with costs, where the mistake is with the taxing officer. *Ward v. Bell*, 2 *Dowl.* 76. *Parsons v. Pitcher*, 6 *Id.* 600.

9. Remedy for costs.

The remedy for costs given by a judgment, is by writ of execution; except in ejectment, where the remedy for costs against the lessor of the plaintiff, or against the defendant if the plaintiff be nonsuit by reason of his not confessing lease, entry and ouster, is by attachment. See "*Ejectment*," *post*. The remedy for costs upon a rule, is in all cases by attachment. See *ante*, p. 119, &c. Where in an action of slander, after notice of trial given, the defendant, by agreement with the plaintiff, signed a written apology, reciting the action, and that the plaintiff had consented, on his paying the costs of the action as between attorney and client, and making an apology, to stay proceedings,—and it then set out the apology; upon his afterwards refusing to pay the costs, the court granted a rule to show cause why he should not pay the plaintiff's attorney the amount of the costs in the action and the costs of the application, or why the plaintiff should not be at liberty to sign judgment against him by default: this

posed by the defendant, on the ground that the papered no undertaking upon his part to pay the costs; but it held that it amounted to a positive undertaking to do so, and they made the rule absolute for the payment of (the amount of the costs), and the costs of the application. *Tardrew v. Brook*, 5 B. & Ad. 880. And see *Riley v. B. & Ad.* 779. But the court will not order a person not a party to the cause, to pay the costs of it; although he is a real party interested in the event of it; *Hayward v. et al.*, 4 Mees. & W. 194. *Richards v. Frankum*, 9 231, *ex. Evans v. Rees*, 1 Dowl. N. C. 338; except as ordered. *Id.*

costs in particular actions, or in particular proceedings: those titles respectively throughout this work.

SECTION IX.

Execution.

1. Execution, generally.

[at cases and how sued out.] A writ of execution is an order to the sheriff to carry into effect the judgment of a court in favour of a plaintiff or defendant. It can only issue after judgment, and not until the judgment is signed; see *Brook*, 5 Dowl. 59; but it is not necessary that the writ should be actually entered on the roll, before the execution is sued out. *Deemer v. Brooker*, 4 Dowl. 9. There are, the *feri facias* against the goods and chattels of the debtor, the *elegit* against his goods and lands, and the *ad satisfaciendum* against his person. The *levari* never occurs in practice, in civil actions, except in the case of outlawry.

There is no objection to having several of these writs run at the same time; as for instance, two writs of *feri facias*, one *ad satisfaciendum*, issued into different counties, *Harding*, 2 Dowl. 803, or a writ of *fi. fa.* and a writ of *ad satisfaciendum* into the same or different counties. *Primrose v. D. & R.* 193. *Smith v. Johnson*, 2 Cr. M. & R. 350. *Warne*, 2 Dowl. 762. But care must be taken, if possible, not more than one is executed. See *Lewis v. Morris* Cr. & M. 712. If a *fi. fa.* be once executed, that is to say sum, however small, be levied under it, no other execution can issue, until the *fi. fa.* be returned. *Milburnell*, 6 Taunt. 370. *Wilson v. Kingston*, 2 Chit. 203. *Dinner v. Cover*, 1 Gale, 45. Where a levy was made *fi. fa.* but the sum levied was barely sufficient to pay due to the landlord, and a small sum towards the expenses of the execution; and the plaintiff therefore sued out a

ca. sa., and had the defendant arrested, before any return was made to the *fi. fa.*: the court, upon application, discharged the defendant, although no part of the plaintiff's debt was satisfied by the *fi. fa.*, and although if the latter writ had been returned, the *ca. sa.* must have issued for the whole sum recovered by the judgment. *Hodgkinson v. Walley*, 2 Tyr. 174, and see *Wintle v. Freeman*, 11 Ad. & El. 539. And in such a case, formerly, when writs of execution were returnable in term time only, the *ca. sa.* could not regularly issue until after the return day of the *fi. fa.*, even although the sheriff had in fact returned the *fi. fa.* before that time. *Lawes v. Codrington*, 1 Dowl. 30.

Having fixed on the writ you mean to adopt, get a blank form on parchment at the stationer's, and fill it up; see the forms in the Appendix; it need not be signed. R. G. H. 2 W. 4, s. 75. Then take the postea, judgment paper or inquisition to the sealer of the writs, who on view thereof will seal the writ. By R. G. H. 2 W. 4, s. 75, no writ of execution "shall be sealed, till the judgment paper, postea or inquisition has been seen by the proper officer." See also R. E. 2 W. 4, C. P. There is no objection to the writ being sued out by a different attorney from the one who conducted the cause, without an order to change the attorney. Tipping v. Johnson, 2 B. & P. 357, ante, vol. 1, p. 67.

Direction, teste and return.] The writ is directed to the sheriff, in precisely the same manner as the writ of *capias*; see *ante*, vol. 1, p. 151; or if the sheriff be a party, it must be directed to the coroners of the county, &c.; *Bastard v. Gutch*, 1 Har. & W. 321, 5 Nev. & M. 109, 4 Dowl. 6; but in this latter case, it is not necessary that the writ should contain any suggestion of the reason for its being directed to the coroners, it will be sufficient to enter such a suggestion on the roll when it is made up. *Id.* The writ, however, at least if it be a *fi. fa.* or *ca. sa.*, must be directed in the first instance to the sheriff of the county in which the venue is laid; and if the property or person of the party be not in that county, then, upon getting that writ returned, you may sue out a *testatum* writ into a different county. If a *testatum* writ be sued out, without a *fi. fa.* or *ca. sa.* to warrant it, it is a clear irregularity; *Brand v. Mears*, 3 T. R. 338; but if application be made to set it aside, the irregularity may be cured, by suing out a *fi. fa.* or *ca. sa.* to warrant the *testatum*, getting it returned, and entering it on the roll, before the time of showing cause; *Milstead v. Coppard*, 5 T. R. 272. *Shaw v. Maxwell*, 6 T. R. 450; and both may bear *teste* on the same day. *Greenshields v. Harris*, 9 Mees. & W. 774. Or if a *fi. fa.* or *ca. sa.* instead of a *testatum*, be issued into a different county from that in which the venue is laid, it will be bad; *Towers v. Newton*, 1 Ad. & El. N. C. 319; but the court will in general allow it to

be amended, so as to make it a *testatum* writ, unless the situation of the parties have been altered by death, bankruptcy, or the like; *post*, *tit. "Amendment;"* and then the party may sue out, &c. a *fi. fa.* or *ca. sa.* to warrant it, as above-mentioned. *But see Towers v. Newton, supra.*

Formerly, in ordinary cases, writs of execution must have borne teste, and been returnable, on some day in term: see *Adams v. Sparry*, 1 *Wils.* 155. *Campbell v. Cuning*, 2 *Burr.* 1187: it was usually either tested on the first day of the term, and returnable on the last, or tested on the first day of one term, and returnable on the first day of the next; but it was no objection to the writ that there were one or more terms intervening between the teste and return, 2 *Salk.* 700, or less than fifteen days, unless in the instance of a *ca. sa.* for the purpose of fixing bail or proceeding to outlawry. 13 *Car.* 2, *st.* 2, c. 2, s. 6. It was immaterial, however, whether the writ bore teste before, on or after the day on which the judgment was actually signed, provided it bore teste on or after the day to which the judgment had relation, namely, the first day of the term in or of which the judgment was signed. *Gowler v. Jolly*, 1 *H. Bl.* 74. And therefore formerly, where a defendant died either in term or vacation, if the plaintiff signed judgment at any time before the *essoign* day of the following term, it would have relation back to the first day of the preceding term, that is to say, to a day previous to the defendant's death, and the plaintiff might teste his writ of *fa.* on the first day of that term, and levy upon the goods of the deceased in the hands of his executor, &c. *Bragner v. Langmead*, 7 *T. R.* 20. *Waghorne v. Langmead*, 1 *B. & P.* 71. But as judgments now have relation, not to the first day of the term, but to the day only on which they are signed, *G. H.* 4 *W.* 4, r. 2, s. 3, a writ of execution founded thereon cannot bear teste before that day; *Peacock v. Day*, 3 *Dowl.* 91, and see *Englehart v. Dunbar*, 2 *Dowl.* 202, but see *Watson v. Maskell*, 2 *Dowl.* 810. *Brocher v. Pond*, *Id.* 472; even where the defendant died between eleven and twelve o'clock in the morning, and a *fi. fa.* was sued out against his goods between two and three in the afternoon of the same day, the writ set aside the writ as irregular. *Chick v. Smith*, 8 *Dowl.* 37. An error, however, in the teste of the writ, may be mended. *Englehart v. Dunbar*, 2 *Dowl.* 202.

But now a writ of execution may be tested in vacation. This alteration in the practice was first introduced by stat. 1 *V.* 4, c. 7, s. 2, which enables the judge at *nisi prius*, whether the verdict be for plaintiff or defendant, or the plaintiff be on suit, to certify on the back of the record that in his opinion execution ought to issue forthwith, or at some day to be therein named; see *post* title "*Trial*;" and the writ of execution in that case may be sued out "*forthwith or after-*

wards, according to the terms of such certificate, on any day in vacation or term," *Id.* s. 2, "but it shall and may bear teste on the day of issuing thereof." *Id.* s. 3. And if afterwards the judgment in such a case be vacated, and execution stayed or set aside, the party affected by such writ of execution shall be restored to all he may have lost thereby, in such manner as upon the reversal of a judgment by writ of error, or otherwise, as the court may think fit to direct. *Id.* s. 4.

And now, by stat. 3 & 4 W. 4, c. 67, s. 2, "all writs of execution may be tested on the day on which the same are issued, and be made returnable immediately after execution thereof." And this is now always adopted in practice; except in the *ca. sa.* sued out for the purpose of fixing bail. *See ante*, vol. 1, p. 202.

It must pursue the judgment.] The writ of execution must strictly pursue the judgment, and be conformable with it. Upon a judgment against two, execution cannot be taken out against one only. *Clarke v. Clement*, 6 T. R. 525. Where a judgment was for 88*l.*, and by mistake the *ca. sa.* was for 100*l.*, but indorsed for 88*l.* only, it was holden irregular; *Arnell v. Weatherby*, 1 Cr. M. & R. 831. *Webber v. Hutchins*, 8 *Moss & W.* 319: but the court will in general allow the writ to be amended in this respect, if the right of a third party have not intervened. *Id.* *Bicknell v. Weatherell*, 1 *Ad. & El. N. C.* 914. In debt on a money bond, the writ of execution, on the face of it, must appear to be for the whole amount of the judgment, namely, the penalty of the bond, the damages and costs; although the indorsement on it, and levy under it, must be only for the sum actually due and costs, &c. *See Williams v. Waring*, 2 Cr. M. & R. 354. *Cobbold v. Chilver*, 11 *Law J.* 173, *cp.* So in debt on bond, conditioned for the performance of covenants, or for the payment of an annuity or the like, within stat. 8 & 9 W. 3, c. 11, s. 8 (*ante*, vol. 1, p. 327), the writ of execution is for the whole debt, &c., because the judgment is so; although it is indorsed to levy the damages assessed merely, and costs. 1 *Saund.* 58, *note*. But where in debt there was judgment for the aggregate amount of the sums in the several counts, and the *fi. fa.* instead of pursuing the judgment was for the amount really due only, and the defendant applied to set it aside for this irregularity; and the plaintiff to prevent this, entered the proceedings on the roll, with a remittitur for the excess: this was holden to be a good answer to the application. *King v. Birch*, 11 *Law J.*, 183, *qb.* *Phillips v. Birch*, *Id.* 297, *cp.* On the other hand, where a judgment was for 450*l.* but by mistake the *fi. fa.* was for 400*l.* only, and indorsed for that sum, and which sum the defendant immediately paid; and upon the mistake being perceived, the remaining 50*l.* was demanded of him, but he refused to pay it: the

court upon application granted a rule calling upon him to show cause why he should not pay the 50*l.*, or why a new writ of *fi. fa.* for that amount should not issue. *Hunt v. Passmore*, 2 Dowl. 414. As to amendments in such cases, see *post*, *tit.* "Amendment."

How indorsed.] We have above mentioned that in debt on a common money bond, although the execution is in form for the whole penalty and costs, the plaintiff must indorse his writ to levy only the sum actually due for principal and interest and costs. See *Williams v. Waring*, 1 Gale, 268. So in debt on bond, conditioned to perform covenants, or to pay an annuity, &c., where breaches are assigned under the stat. 8 & 9 W. 3, c. 11, s. 8, (*ante*, vol. 1, p. 327), although the execution must be for the penalty and costs, yet it must be indorsed to levy only the amount of the damages assessed and costs. 1 Saund. 58, *note*. So where money has been paid on account of a judgment, the execution, although in form for the whole amount, must be indorsed to levy only the balance. See *Plevin v. Henshall*, 2 Dowl. 743. So where judgment was entered up upon a warrant of attorney to secure an annuity, and the execution was indorsed to levy the whole, and the defendant was taken in execution for the whole, instead of merely the arrears, according to the terms of the defeasance, the court discharged the defendant. *Tilby v. Best*, 16 East, 163. Where the plaintiff included in the sum indorsed the extra costs in another action, which the defendant had promised to pay, the court upon application reduced the sum, by striking out the amount of these costs, holding them to be the subject of an action only. *Evans v. Pugh*, 2 Dowl. 360.

A *fi. fa.* and *elegit* are indorsed thus:—"Levy [*the whole*," or "35*l.* 4*s.* 6*d.*], with interest on the same at the rate of four per cent. per annum from the — day of — 1843 [the date of the judgment], besides sheriff's poundage, officer's fees, and all other incidental expenses;" adding the attorney's name and address. A *ca. sa.* is indorsed thus: "Levy [*the whole*," or "35*l.* 4*s.* 6*d.*], with interest [&c. as above], besides officer's fees, &c." adding the attorney's name and address. There is also a rule of the court of Queen's Bench, by which it is required that the attorney for the plaintiff or his agent shall, upon every *fi. fa.* or *ca. sa.*, indorse "the place of bode and addition of the party against whom the writ is issued, or such other description of him as such attorney or agent may be able to give;" *R. H.* 2 & 3 *G.* 4; otherwise the court will set aside the writ, *Clark v. Palmer*, 9 B. & C. 153, if the application be made in proper time. *Edaile et al. v. Davis*, 6 Dowl. 465. But this rule is not adopted in the Exchequer, *Strong v. Dickenson* 5 Dowl. 99, nor in the court of Common Pleas. *Brown v. Hudson*, 8 Dowl. 4.

When to be sued out.] A writ of execution we have seen (*ante*, p. 83,) cannot be sued out before the judgment is actually signed. If the judge at *nisi prius* grant a certificate for immediate execution, or for execution at a certain time, the party may sue out execution at or after the time specified in such certificate. *Ante*, vol. 1, p. 380. But he must sue it out within a year from the signing of the judgment, 2 *Saund.* 72 *e*, unless it be suspended by writ of error, *Id.* or injunction, *Id.* 72 *f*, or the plaintiff have judgment with a *cesset executio*, *Id.* *Hiscocks v. Kemp*, 5 *Nev. & M.* 113, and then within a year after the writ of error has been determined, the injunction dissolved, or the time for which the execution was stayed has expired; otherwise the judgment must first be revived by *scire facias*, before execution can regularly be sued out upon it. *Stat. Westm.* 2 (13 *Edw.* 1) c. 45. But if sued out within the year, it may be executed after the year has elapsed. *Simpson v. Heath*, 5 *Mees. & W.* 631.

Delivery of writ to be executed.] Having prepared your writ and properly indorsed it, and had it sealed, as already directed, take it to the sheriff's office and obtain a warrant upon it, and then give the warrant to the officer who will execute it. Or in country cases you may deliver it to the sheriff's agent in town, which will be deemed the same, in effect, as delivering it at the sheriff's office in the country. *Woodland et al. v. Fuller et al.*, 11 *Ad. & El.* 859, 9 *Law J.*, 181, *qb.*, and see *ante*, vol. 1, p. 22. Where upon a motion to discharge a prisoner out of the custody of the sheriff, on the ground of his not having been charged in execution within two terms after judgment, it appeared that a *ca. sa.* for that purpose had been lodged with the sheriff's agent in town within the two terms, but not actually delivered to the gaoler in the country, until after that time, the court held it to be sufficient, as a delivery to the sheriff's agent was a delivery to the sheriff. *Williams v. Waring*, 1 *Gale*, 268. A variance between the warrant and the writ is not material. *Rose v. Tomblinson*, 3 *Dowl.* 49. The party applying for the warrant, may have it directed to a special bailiff of his own nomination, if he will; but his merely naming one of the sheriff's own officers, and getting the warrant directed to him, does not make that officer a special bailiff, so as to relieve the sheriff from responsibility for his acts. *Balson v. Meggat*, 1 *Har. & W.* 659, 4 *Dowl.* 557. *Corbet v. Brown*, 6 *Dowl.* 794.

As to sheriff's poundage, officers' fees, expenses, &c., see *ante*, vol. 1, p. 22.

As to ruling the sheriff to return the writ, see *ante*, vol. 1, p. 32.

Priority of writs.] A writ of execution against the goods of

binds the property therein, from the time of its death the sheriff. 29 C. 2, c. 3, s. 16. See *Samuel v. Duke Mees. & W.* 622. *Woodland et al. v. Fuller et al.*, 11 . 859. Therefore, if two writs against the same party, it of different persons be delivered to the sheriff at times, that which was first delivered shall have priority, though the actual seizure was first made under the writ; *Hutchinson v. Johnson*, 1 Tr. 729, and see *Jones on*, 7 Taunt. 56. *Sawle v. Paynter*, 1 D. & R. 307. *Drew*, 4 East, 523; and as to the proper return to in such a case, see *Wintle v. Ld. Chetwynd*, 7 Dowl. 588. *Heenan v. Evans* Law J., 1, cp. But if the first writ be fraudulent, *ly v. Windham*, 1 Wils. 44. *Warnell v. Young*, 5 B. 3. *Barber v. Mitchell*, 2 Dowl. 574, or be set aside, *v. Sh. of Middlesex*, 3 B. & A. 95, or be withdrawn, *v. Freethy*, 1 Bing. 71, the sheriff shall execute the writ. So where the sheriff seized under a writ of *fi. fa.* in which it was directed by the execution creditor not to sell, but merely put an officer in possession, and afterwards went off with the goods; in November following a *fi. fa.* at the suit of the creditor against the same party, was delivered to the sheriff, who returned *nulla bona* to it: an action thereupon brought for a false return, the court held it maintainable; the sheriff, when he found the officer in possession, should have inquired into the facts, and if he had he would have found the first execution to be fraudulent: he should therefore have executed the second. *Lovick v. Ker*, 8 B. & C. 132, and see *Kempland v. Macauley*, 5. *Pringle v. Isaac*, 11 Price, 445.

y for the amount levied.] Debt will lie against a sheriff to recover the amount levied by him under a writ of *fi. fa.*, whether he have returned the writ or not; see 2 D. & R. 44, note 2; it is usual, however, and advisable, to return the writ first, and then to proceed in the execution upon the return. The sum levied, also, ought to be paid before action brought; for otherwise the court, on application, will stay the proceedings in the action, on payment of the sum levied, without costs. *Jefferies v. Shephard*, 1 B. & A. 696. See *Dale v. Birch*, 3 Camp. 347. Where the sheriff returned that he had seized goods under a *fi. fa.* and that the residue remained in his hands for want of sale: it was holden, in an action brought against him for the amount levied, that he might show that the defendant's original action was in fact a bankrupt at the time of the sale, and the goods the property of his assignees. *v. Walford*, 6 M. & S. 42, and see *Tomlinson v. Shynn*, 1 B. 77.

: sheriff may be called upon by rule, to pay over the

money levied to the plaintiff; which rule the court will afterwards, if necessary, enforce by attachment. *Stockdale v. Hassard*, 11 *Ad. & El.* 253.

2. *Fieri Facias*.

The manner in which this writ is sued out, its teste and return, the sum for which it is to be filled up, and the form of the indorsement, have been already mentioned, *ante*, pp. 83—87. It only remains to notice the manner in which it is to be executed, and what property may be seized and sold under it.

What goods, &c., may be taken.] The writ commands the sheriff that of the "goods and chattels" in his bailiwick belonging to the defendant, &c., he cause to be made a certain specified sum. "Goods and chattels" were formerly deemed to include only such things as the sheriff could sell. And therefore it was holden that he could not seize money or bank notes. *Knight v. Criddle*, 9 *East*, 48. *Padfield v. Brine*, 3 *Brod. & B.* 294. *Fieldhouse v. Croft*, 4 *East*, 510. *Willows v. Ball*, 2 *New Rep.* 376.

But now by stat. 1 & 2 *Vict. c.* 110, s. 12, it is enacted, that by virtue of any writ of *fieri facias* sued out after the 1st October, 1838, or any precept in pursuance thereof, "the sheriff or other officer having the execution thereof, may and shall seize and take any money, or bank notes (whether of the governor and company of the Bank of England, or of any other bank or bankers), any cheques, bills of exchange, promissory notes, bonds, specialities or other securities for money, belonging to the person against whose effects such writ of *fieri facias* shall be sued out." *Id.* s. 12. And the sheriff or officer shall deliver to the execution creditor any money or bank notes so seized, or a sufficient part thereof; and the cheques, bills of exchange, &c. he shall hold as a security for so much as shall not have been raised or levied. *Id.* And the sheriff may sue in his own name for the recovery of sums secured by such cheques or bills, &c., when the time of payment thereof shall have arrived; but he shall not be bound to do so, unless the execution creditor "enters into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action." *Id.* The money so recovered shall be paid over to the execution creditor, or such part thereof as shall be sufficient to satisfy the execution, and the residue (if any) shall be paid to the party against whom the writ was issued. *Id.* See *Harrison v. Paynter*, 6 *Mees. & W.* 387. But where money was paid into the hands

of the sheriff of Gloucestershire by a defendant arrested upon a *ca. sa.*, and the writ was afterwards set aside and the money ordered to be returned to him; the plaintiff then sued out a *fi. fa.*, directed to the sheriff of Gloucestershire, and another to the sheriff of Middlesex, and as the London agent of the sheriff of Gloucester was about to pay the money over to the defendant, the sheriff of Middlesex claimed to have it handed over to him under the *fi. fa.* which he held: the court however held that it was not money of the defendant, until it was actually paid to him, and that therefore before it was so paid, it could not be seized under the *fi. fa.* *Masters v. Stanley*, 8 *Dowl.* 169, 9 *Law J.*, 145, *ex.* So where money is paid into court in lieu of bail, it cannot be taken under a *fi. fa.* in another action against the defendant, even although bail have been put in and perfected, and the money remain in court; for the above section does not extend to money in the hands of a third party in trust for the debtor. *France v. Campbell*, 9 *Dowl.* 914.

Mere tenant's fixtures, belonging to a defendant, may be seized, removed and sold, under a *fi. fa.* against him; but if he be owner of the freehold, those fixtures which are actually attached to it, such as ranges, ovens and the like, cannot be taken under a *fi. fa.*, for they are parcel of the freehold, and not goods or chattels. *Wynne v. Ingleby*, 5 *B. & A.* 625. So, where mill machinery and a mill were demised to a tenant for a term, and he severed the machinery from the mill without the consent of the landlord, and it was seized by the sheriff under a *fi. fa.*, and sold by him: the court held that no property in the machinery passed by the sale. *Farrant v. Thompson*, 5 *B. & A.* 826, and see *Steward v. Lombe*, 1 *Brod. & B.* 506. But the sheriff may sell a term for years in lands or houses, &c., belonging to a person against whom he has a *fi. fa.*; and if he sell it before the return of the writ, he may execute the assignment at any time after it. *Doc v. Donston*, 1 *B. & A.* 230. See *Dos v. Jones*, 11 *Law J.*, 50, *ex.* He cannot however sell a mere equitable interest in a term for years. *Scott v. Scholey*, 8 *East*, 467. *Metcalf v. Scholey*, 2 *New R.* 461. Nor can he turn a tenant out of possession, where he has taken a term under an execution against the landlord; *Rumball v. Murray*, 3 *T. R.* 298, and it is doubtful whether he can put the debtor himself out, in order to give possession to the vendee, see *Taylor v. Cole*, 3 *T. R.* 292, 298, or whether the vendee must not obtain possession by ejectment. Where the sheriff takes a lease and fixtures in execution, if he cannot find a purchaser for the whole, he must sell the fixtures separately. *Barnard v. Leigh*, 1 *Stark.* 43. So the sheriff may sell the growing crops upon land in the occupation of a tenant for term of years. See *Tompkins v. Russell*, 9 *Price*, 287. But where the sheriff seized growing crops under a *fi. fa.*, and before he sold them a writ

of possession was delivered to him, at the suit of the tenant's landlord, founded on a demise of a date long before the *fi. fa.*: the court held that the sheriff was not bound to sell the crops under the *fi. fa.*; for as, after the date of the demise, the tenant was merely a trespasser, the crops could not legally be considered as belonging to him. *Hodgson v. Gascoigne*, 5 B. & A. 88.

The goods seized must be the goods and chattels of the party against whom the judgment was obtained and the execution sued out. And therefore if they be really the goods of another, although in the possession and apparent ownership of the defendant, they cannot be taken under an execution against him. See *Dawson v. Wood*, 3 Taunt. 256. *Edwards v. Bridges*, 2 Stark. 396. *Saunderson v. Baker*, 2 W. Bl. 832. For instance, goods on which the party has a mere lien, cannot be seized and sold under a *fi. fa.* against him; *Legg v. Eames et al.*, 6 Mees. & W. 36; although goods of his, in the hands of a third person, and on which such third person has a lien, may, upon satisfaction of the lien. *Proctor v. Nicholson*, 7 Car. & P. 67. So, goods lent on hire, cannot be taken in execution for the debt of the hirer; *Dean v. Whittaker*, 1 Car. & P. 347; goods of a testator in the hands of his executor, cannot be taken for the debt of the executor; *Farr v. Newman*, 4 T. R. 621, but see *Quick v. Staines*, 1 B. & P. 203; and the goods of a trader who has committed an act of bankruptcy, cannot legally be taken under an execution against him, although the sheriff and execution creditor have no notice of the bankruptcy, *Price v. Helyar*, 4 Bing. 597, *Garland v. Carlisle* 4 Bing. N. C. 7, unless indeed the execution be *bond fide* executed or levied before the date and issuing of any *fiat* against him, 2 & 3 Vict. c. 29; and the court in such a case will take notice of a fraction of a day. *Pewtress et al. v. Annan*, 9 Dowl. 828, and see *Thomas et al. v. Desanges et al.*, 2 B. & A. 586. So in the case of an insolvent debtor, if a judgment be signed against him on warrant of attorney, or *cognovit*, his goods cannot be sold under a *fi. fa.* thereon after his imprisonment, 1 & 2 Vict. c. 110, s. 61, although they were seized before it. *Kelcey v. Minter*, 1 Bing. N. C. 721. And after he has been adjudged to be discharged, no *fi. fa.* for any debt from which he has been discharged, can be executed against any property he may have, 1 & 2 Vict. c. 110, s. 91, even in a joint action against him and others. *Raynes et al. v. Jones et al.*, 11 Law J., 62, *ex.* So where a vesting order is obtained against an insolvent debtor, before the writ of *fi. fa.* is lodged with the sheriff, the writ cannot afterwards be executed; but if the writ be lodged with the sheriff, or even with his deputy in town, before the vesting order issues, although on the same day, it is otherwise. *Woodland et al. v. Fuller et al.*, 11 Ad. & El. 859. If a man make a bill of sale of furni-

ture or goods, by way of mortgage or security for money lent or goods sold to him, and by the deed he is to remain in possession until default made in the payment: such furniture or goods cannot be seized under a *f. fa.*, at the suit of another creditor. *Martindale v. Booth*, 3 B. & Ad. 498. *Steward v. Lombe*, 1 Brod. & B. 506, 4 Moore, 281, and see *Ladbroke v. Crickett*, 2 T. R. 649. But if the bill of sale be absolute, and not by way of mortgage, and the vendor be allowed to remain in possession, then, although it may be valid as between the parties, yet it is not so as against the creditors, *Paget v. Perchard*, 1 Esp. 205. *Edwards v. Harben*, 2 T. R. 537, *Wordall v. Smith*, 1 Camp. 333, unless the bill of sale be by the sheriff under an execution, *Watkins v. Birch*, 4 Taunt. 823. *Kidd v. Rawlinson*, 2 B. & P. 59. *Joseph v. Ingram*, 8 Taunt. 838. *Latimer v. Batson*, 4 B. & C. 652, or that the sale were by public auction, *Wooderman v. Baldock*, 8 Taunt. 676, *Moore*, 11. *Leonard v. Baker*, 1 M. & S. 251, or the transfer of property in the goods were in some other manner notorious; or unless the sale were made with the consent or privity of the party seeking to impugn it. *Steel v. Brown*, 1 Taunt. 381. Also where a man upon his marriage, in consideration thereof, and of 10,000*l.*, his wife's portion, conveyed his real estate, and also his household goods (his real estate not being deemed an adequate settlement) to trustees, in trust for himself for life, remainder to his wife for life, remainder to the issue, &c., and continued in possession after the marriage: it was holden that these household goods could not be taken in execution under a *f. fa.* against the husband, even at the suit of one who was a creditor at the time of the settlement. *Cadogan v. Kennet*, *Cowp.* 432. But wearing apparel, &c., of a wife, bought by her with money settled to her separate use, vests in her husband, and may be seized and sold under a *f. fa.* against him. *Carne v. Brice et al.*, 7 Mees. & W. 183. So if the debtor have fraudulently assigned his goods to another, for the purpose of defeating the execution, the sheriff may seize and sell them under a *f. fa.* against the debtor; but otherwise where the assignment is for a valuable consideration, and not fraudulent against creditors within stat. 13 El. c. 5. *Gale v. Williamson*, 8 Mees. & W. 405.

In the case of an execution against the goods of one of two partners, in strictness the sheriff can only sell that partner's undivided share in the partnership property; but if he sell the shares of both, he must pay over to the other partner his share of the produce of the sale. *Eddie v. Davidson*, 2 Doug. 650. See *Chapman v. Koops*, 3 B. & P. 289.

As to the execution by *f. fa.* against the property of a 'domestic or domestic servant' of a foreign ambassador, see vol. 1, p. 133.

If after the sheriff has seized goods under a *fi. fa.* any third person claim them, the sheriff may immediately apply to the court under the interpleader act, in order that the validity of the claim may be decided, and that he may be relieved from all further responsibility. See post, title "Interpleader."

How executed.] The sheriff may enter the house of the party, against whom he has a *fi. fa.* and there seize his goods under it. He cannot break open an outer door, to effect an entrance; but having once entered by the outer door, he may break open an inner door, without previously demanding to have it opened. *Hutchinson v. Birch*, 4 Taunt. 619. Or he may enter the house of a third party, for the purpose, if there be goods of the debtor there; but he will only be justified in doing so, in the event of his finding goods there which may be legally seized and sold under the writ. Under a *fi. fa.* against the goods of an intestate, however, he may justify entering the house of the husband of the administratrix, whether he find the goods there or not. *Cooke v. Birt*, 5 Taunt. 765.

Having made the seizure, the officer must leave some person in possession of the goods, see *Blades v. Arundale*, 1 M. & S. 711. *Ackland v. Paynter*, 8 Price, 95. *Doker v. Hasler*, 2 Bing. 479, and should leave his warrant with him. Afterwards he makes an inventory of the goods, or of so much as he may deem sufficient to satisfy the debt, poundage and expenses; and ultimately proceeds to sell them, either by bill of sale or by public auction. If the debtor choose to tender the debt, in order to prevent a sale, he must take care to tender also the amount of such fees, &c., as the execution creditor would be entitled to levy for. See *Bayley v. Potts*, 8 Ad. & El. 272.

Venditioni exponas, and distringas.] If you rule the sheriff to return a *fi. fa.* and he return that he has seized goods of the defendant, but that they remain on his hands for want of buyers, the only legal mode of compelling him to sell them, is by suing out and lodging with him a writ of *venditioni exponas*, if he be still in office, see *Cameron v. Reynolds*, *Corp.* 406, or a writ of *distringas nuper vicecomitem*, directed to the present sheriff, if the other be out of office. Care should be taken to sue out these writs with as little delay as possible; for if bankruptcy should intervene, *Clutterbuck v. Jones*, 16 East, 78, or the goods be seized under an extent, *Ruston v. Hatfield*, 3 B. & A. 204, you will lose the benefit of your execution.

In obedience to the *venditioni exponas*, the sheriff must sell the goods, and have the money in court on the return day. If he do not, you may sue out a *distringas* to the coroners, upon which issues may be levied, as shall presently be noticed, so as to compel him to sell the goods; but the court will not punish him by attachment. *Leander v. Davis*, 1 B.

& P. 359. See the form of the venditioni, Arch. Forms, 168, 169, 170.

The *distringas nuper vicecomitem* commands the present sheriff to distrain the late sheriff, so that he expose to sale and sell the goods; see the form, Arch. Forms, 170, 171. Under that writ, the sheriff levies and returns issues to the amount of 40s.; and if at the return of that writ, the goods be not sold and the money brought into court, move to increase issues, and the court will at once order issues to the amount of the whole debt and the costs occasioned by the sheriff's neglect. See *Phillips v. Morgan*, 4 B. & A. 653. *Nowell v. Underwood*, 5 Dowl. 229.

Rent deducted.] By stat. 8 Anne, c. 14, s. 1, no goods or chattels, being in or upon any messuage, lands or tenements, leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution, on any pretence whatsoever, unless the party, at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the premises such sum as is due for rent of the said premises at the time of the seizure, not exceeding one year's rent; and the sheriff shall thereupon proceed to levy, as well the money so paid for rent, as the money to be levied under the execution. This extends to executions, as well at the suit of defendants, as of plaintiffs. *Henchett v. Kimpson*, 2 Wils. 140. It extends however only to cases where the tenancy is still in existence at the time of the seizure, and not to executions after the tenancy has determined. *Hodgson v. Gascoigne*, 5 B. & A. 88.

The statute requires the payment of the rent, before the goods are removed from the premises; and if therefore they be sold and removed, the sheriff will be liable for the whole amount of the rent due, although the goods may have been sold for less. See *Foster v. Hilton*, 1 Dowl. 35. *Calvert v. Jokiffe*, 2 B. & Ad. 418, and see *Groombridge v. Fletcher*, 2 Dowl. 353. See *Gவில்him v. Barker*, 1 Price, 274. The statute says that the party at whose suit the execution is sued out, shall pay the rent; but as it is the sheriff who removes the goods, he is the party always deemed liable; and the landlord may proceed against him for the amount, either by application to the court, or by action. See *Duck v. Braddyl*, 13 Price, 455. *Green v. Austin*, 3 Camp. 260. *Forster v. Cookson*, 1 Ad. & El. N. C. 419. *Reed v. Thoyts*, 6 Mees. & W. 410. The sheriff however must have notice of rent being due; *Smith v. Russell*, 3 Taunt. 400; but if this notice be given at any time whilst the goods or their produce are in the hands of the sheriff, it will be sufficient. *Arnitt v. Garnett*, 3 B. & A. 440. Even where a sheriff, knowing that rent was due to a landlord, proceeded to sell the

party
under
entire
broad
have
may
be
doing
legally
the
the
find

How
son in
S. 711.
Sing, 4
he make
deem so
and with
by public
order to
amount
entitled

Fend
to return
the debt
buyers, c
by suing
if he has
a writ of

the King's court, is allowed to *elect*, to have a writ of fieri *in* *re*, or that the sheriff shall deliver to him all the chattels of the defendant, (save his oxen, and beasts of his plough), the one half of his land until the debt be levied, upon a reasonable price and extent. And as by later statutes, (23 H. 6. 15, s. 1, and 4 J. 1, c. 3, s. 2,) a defendant shall have the same writs of execution for his costs as a plaintiff for his damages, &c., a defendant may of course have a writ of *elegit*, as will. If there be judgment against two, and one of them the *elegit* must be against the survivor, and the heir and tenants of the deceased (the latter being previously made parties to the judgment by *scire facias*); for although the judgment survives as to the personality, it does not as to the estate. 2 Saund. 51, note 4.

As to the manner of suing out the writ, its teste and return, the sum for which it is to be filled up, and the form of the writ, see *ante*, p. 83, 84, &c. It only remains to notice the manner in which it is to be executed, and what property may be extended under it.

[*What property may be extended, &c.*] In the first place the writ is to deliver to the execution creditor, all the goods and chattels of the debtor (except his oxen and beasts of his plough), at an appraised "price" or value, as hereafter mentioned; and if there be sufficient to satisfy the judgment, the debtor's lands of course are not to be extended.

But if there be no goods, or (which is the same thing) no chattels of there being any, then the sheriff shall extend the value of his lands, freehold and copyhold, &c. Formerly he could extend only a moiety of the debtor's freehold lands, and half of his copyholds; *Morris v. Jones*, 2 B. & C. 232; but now, by stat. 1 & 2 Vict. c. 110, s. 11, "It shall be lawful for the sheriff or other officer, to whom any writ of *elegit*, or any writ in pursuance thereof, shall be directed, at the suit of any person, upon any judgment which at the time appointed for the commencement of this act shall have been recovered, or shall be thereafter recovered, in any action in any of Her Majesty's superior courts at Westminster, to make and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold and customary tenure, the person against whom execution is so sued, or any person in trust for him, shall have been seized or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall, at the time of entering up such judgment or at any time afterwards, have any disposing power which he might without the assent of any other persons exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of

VOL. II.

one moiety of the lands and tenements of any person against whom a writ of elegit is sued out; which lands, &c., shall be held and enjoyed by the execution creditor, subject to such account in the court out of which such execution shall have been sued out, as a tenant by elegit is now subject to in a court of equity." Whether, therefore, they be estates in possession, or in reversion after leases for lives or years, 2 *Saund.* 69, or whether the debtor have the legal estate, or the lands be vested in others in trust for him, *supra*, see 2 *Saund.* 11, note 17, is immaterial. A term for years may either be delivered to the judgment creditor, at an appraised price or value, as any other chattel, or a moiety may be extended in the same manner as other lands. 2 *Saund.* 68, *e, f.*

Writ, how executed.] The writ is executed, by the sheriff summoning an inquest, to appraise the goods and extend the lands; and their inquisition constitutes his return to the writ. Upon leaving the writ of elegit, at the sheriff's office, the undersheriff will appoint a time for its execution; no notice to the debtor is necessary. At the time appointed, attend with your witnesses and other necessary evidence of the goods, and their value (if you claim to have them delivered to you), and the metes and bounds of the defendant's lands, houses, &c., and their annual value; and as you are aware beforehand of what you will be able to prove to the inquest in these respects, you will have no difficulty in getting the inquisition drawn by a barrister or pleader, and you may have it engrossed, (leaving a few blanks to be afterwards filled up), ready for the inquest to sign, immediately after the elegit is executed. The proceeding altogether is very similar to the execution of a writ of enquiry.

The inquisition must set out the land, &c., extended, by metes and bounds, otherwise it will be void; *Penny v. Durrant*, 1 B. & A. 40; and an objection on this ground may be taken at *nisi prius*, in ejectment for the moiety extended. *Id.*

Get the writ returned and filed, and enter upon the roll an award of the writ and the inquisition; see the forms, in the Appendix. You may then commence an ejectment, to recover the lands extended. And you will also be entitled to the rents becoming due after the taking of the inquisition, if the tenants have notice; but not to the rents due before, even although they be not paid at the time of the inquest. *Sharp v. Key*, 8 *Mees. & W.* 379.

After the debt and costs have been satisfied, the tenant may get back his land by a *scire facias ad rehavendam terram*, see 2 *Saund.* 72, *w.*, or by bill in equity. But a much easier and more simple mode of proceeding in such a case, is, to apply to the court, upon affidavit, who will thereupon refer it to the master to take an account of the rents and profits actually received; and if it appear that the debt, &c. has thereby been

d, they will order possession to be restored to the debtor. *Price v. Varney*, 3 B. & C. 733. See *stat.* 1 & 2. 110, s. 11, *supra*.
unds, however trifling the value, be extended under an the party cannot afterwards sue out a *fi. fa.* or *ca. sa.* : same judgment; 2 *Saund.* 68, b, c; but he may sue her writs of *elegit* directed to the sheriffs of other es. *Id.* 68, b.

4. *Capias ad satisfaciendum.*

manner in which this writ is sued out, its teste and re- the sum for which it is to be filled up, and the form of dorsement upon it, have been already fully noticed, *ante*, 4, &c. As to the manner in which the writ is executed, *Id.*, vol. 1, p. 161; upon an arrest under a *ca. sa.* how- it is not necessary to serve a copy of the writ upon debtor, as in the case of an arrest upon mesne process; it necessary that the officer should wait twenty-four before he takes the party to prison. *Evans v. Atkins*, 555. See *ante*, vol. 1, p. 165. Where the defendant was y arrested upon mesne process, at a time when a *ca. sa.* t him, at the suit of another party, was lying in the of the sheriff, Littledale, J., held, that however the de- t might be entitled to be discharged as to the mesne s, the sheriff was fully warranted in detaining him upon *ca. sa.*, as that writ attached the instant the defendant was today. *Arundel v. Chitty*, 1 Dowl. 499. See *Mackie v.* n, 5 Bing. 176. *Barrack v. Newton*, 1 Ad. & El. N. C. d see *ante*, vol. 1, p. 165—168. As to privilege from see *ante*, vol. 1, p. 163. Where the defendant pleaded s, and there was judgment thereon of *respondeas ouster*, e plaintiff then proceeded in his action, obtained judg- and had the defendant taken in execution upon a *ca.* ie court refused to set aside the writ, on an affidavit of erage, holding that such an application could not be ined after the judgment of *respondeas ouster*. *Digby v.* der, 1 Dowl. 713.

of discharge.] If a party, having another in custody ution, discharge him, he cannot afterwards take him n execution for the same debt, or have any writ of ex- i against his property, although he was discharged an undertaking to do something which he afterwards to do, *Tanner v. Hague*, 7 T. R. 420, or upon an stipulation that the plaintiff should be at liberty to m again; *Blackburn v. Stupart*, 2 East, 243; by the ge, the debt is altogether extinguished. *Goodman et al.* re, 1 B. & A. 297. So if there be a joint *ca. sa.* against

two, and both be arrested, and the plaintiff discharge one of them, that will operate as a discharge of the other. *Ballam v. Price*, 2 *Moore*, 235. Or if the writ be against two, and one alone be arrested, if the plaintiff discharge him, he can never afterwards retake him, or take the other, although he discharged the first on an undertaking which was not afterwards performed. *Clarke v. Clement*, 6 *T. R.* 525. But where in a warrant of attorney, given to secure a principal sum, payable by instalments with interest, it was stipulated that the lender might sue out execution from time to time for the principal or interest, or any part thereof; and he afterwards arrested the debtor on a *ca. sa.* for the amount of one instalment, and the interest then due, but discharged him upon the undertaking of a third party that he should be forthcoming if it should be necessary again to take him in execution: it was holden that this was no discharge of the defendant from the residue of the debt, nor did it prevent the plaintiff from having the defendant arrested for any subsequent instalment. *Atkinson v. Baynton*, 1 *Hodg.* 7. So where breaches are assigned in debt on bond conditioned to perform covenants, &c. (see *ante*, vol. 1, p. 327), if the defendant be taken in execution for the damages assessed, and discharged, he may afterwards be taken in execution for damages assessed for further breaches upon the same judgment. *Per Tindal, C. J. Id.* 11. So, if the defendant be discharged for irregularity in the proceedings, this is no bar to a *scire facias* on the judgment. *Collins v. Beaumont*, 10 *Ad. & El.* 225. So where the discharge was effected by fraud, and the plaintiff had the party arrested a second time, the court refused to discharge him. *Baker v. Ridgway*, 2 *Bing.* 41. So, where several defendants were taken upon a *ca. sa.*, and one was discharged under the Lord's Act, and was not opposed: it was urged that the plaintiff not having opposed this defendant, was equivalent to his voluntarily discharging him, and that it therefore operated as a discharge of the other defendants; but the court held otherwise. *Nadin v. Battie*, 5 *East*, 147.

The sheriff is authorised by the writ, to arrest the party, and have his body in court at the return of the writ; but he is not thereby authorised to receive from the party the amount of the debt and costs. If the party arrested wish to pay the amount of debt or costs, he should pay or tender it to the execution creditor or his attorney. Where a defendant, who was in custody under a *ca. sa.*, tendered the amount of the debt and costs to the plaintiff, but he refused to receive it, or to give a discharge, unless the defendant would pay a collateral demand for costs in another matter: it was holden that the defendant might maintain an action against him for maliciously refusing to discharge him, and that the refusal to sign the discharge was sufficient *prima facie* evidence of malice,

in the absence of circumstances to rebut the presumption. *Crozier v. Pilling*, 4 B. & C. 26, 6 D. & R. 129. But where there was a vesting order of the Insolvent court, at the time of the tender, and it was on that account the plaintiff refused to discharge the defendant, the court held it to be a good justification. *Hounsfield v. Drury et al.*, 11 Ad. & El. 98. *Drury v. Hounsfield*, *Id.* 101.

Where a party in custody on a *ca. sa.* escapes, if the escape were negligent, the sheriff or officer, &c. who had him in custody may retake him; if voluntarily, he cannot. *Filewood v. Clement*, 6 Dowl. 508.

5. Execution on rules, decrees, &c.

By stat. 1 & 2 Vict. c. 110, s. 18, it is enacted, that all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the lord chancellor or of the court of review in matters of bankruptcy, and all orders of the lord chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses shall be payable to any person, shall have the effect of judgments in the superior courts of common law; and the persons to whom any such monies, or costs, charges, or expenses shall be payable, shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts, shall and may be exercised by courts of equity with respect to matters therein depending, and by the lord chancellor and the court of review in matters of bankruptcy, and by the lord chancellor in matters of lunacy, and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies, or costs, charges, or expenses, are by such orders or rules respectively directed to be paid.

And by sect. 20, such new or altered writs shall be sued out of the courts of law, equity, and bankruptcy, as may by such courts respectively be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the judges of such courts respectively shall from time to time think fit to order; and the execution of such writs shall be enforced in such and the same manner as the execution of writs of execution is now enforced, or as near thereto as the circumstances of the case will admit; and that any existing writ, the form of which shall be in any manner altered in pursuance of this act, shall nevertheless be of the same force and virtue as if no alteration had been made therein, except so far as the effect thereof may be varied by this act.

It is not necessary, in this case, to ask the leave of the court to sue out execution; the statute gives these rules, &c. the effect of judgments, and all the party has to do is to treat them as such, and sue out the proper writs. *Wallis v. Sheffield*, 7 Dowl. 793. The writ of execution must be sued out of that court, whose decree or order it is intended to enforce. And therefore where upon a decree for costs in equity, a writ of *ca. sa.* was sued out in the court of Common Pleas, that court, upon application, set it aside, with costs. *Re Sandford*, 1 Dowl. N. C. 183. As to execution upon rules and orders of the courts of law at Westminster. *see post*.

6. *Execution on judgments or rules of inferior courts.*

By stat. 1 & 2 Vict. c. 110, s. 22, it is enacted, that in all cases where final judgment shall be obtained in any action or suit in any inferior court of record, in which at the time of passing of this act a barrister of not less than seven years standing shall act as judge, assessor, or assistant, in the trial of causes, and also in all cases where any rule or order shall be made by any such inferior court of record as aforesaid whereby any sum of money, or any costs, charges, or expenses shall be payable to any person, it shall be lawful for the judges of any of Her Majesty's superior courts of record at Westminster, or, if such inferior court be within the County Palatine of Lancaster, for the judges of the court of Common Pleas at Lancaster, or for any judge of any of the said courts at chambers either in term or vacation, (upon the application of any person who at the time of the commencement of this act shall have recovered, or who shall at any time thereafter recover such judgment, or to whom any money, or costs, charges, or expenses shall be payable by such rule or order as aforesaid, or upon the application of any person on his behalf, and upon the production of the record of such judgment, or upon the production of such rule or order, such record, or rule, or order, as the case may be, being respectively under the seal of the inferior court and signature of the proper officer thereof), to order and direct the judgment, or, as the case may be, the rule or order of such inferior court, to be removed into the said superior court, or into the court of Common Pleas at Lancaster as the same may be; and immediately thereupon such judgment, rule, or order, shall be of the same force, charge, and effect, as a judgment recovered in, or a rule or order made by, such superior court; and all proceedings shall and may be immediately had and taken thereupon, or by reason or in consequence thereof, as if such judgment so recovered, or rule, or order so made, had been originally recovered in or made by the said superior court, or into the court of Common Pleas at Lancaster, as the case may

be, and all the reasonable costs and charges attendant upon such application and removal shall be recovered in like manner as if the same were part of such judgment, or rule, or order: provided always, that no such judgment, or rule, or order, when so removed as aforesaid, shall affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, any further than the same would have done if the same had remained a judgment, rule, or order of such inferior court, unless and until a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same.

7. *Interpleader at the instance of the sheriff.*

By stat. 1 & 2 W. 4, c. 58, s. 6, reciting that difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the courts of law at Westminster, the court of Common Pleas of Lancaster, and the court of Pleas at Durham, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons, not being the parties against whom such process has issued, whereby sheriff's and other officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection in such cases to such sheriff's and other officers: it was therefore enacted, "that where any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the court from which such process issued, upon application of such sheriff or other officer, made before or after the return of such process, and as well before as after any action brought against such sheriff or other officers, to call before them, by rule of court, as well the party issuing such process, as the party making such claim, and thereupon to exercise, for the adjustment of such claims and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the court." *See ante*, vol. 1, p. 266—268.

In what cases.] It is only in cases where a claim has been actually made to the goods seized or the produce of them by some third person, that the court in strictness can grant a rule of interpleader, at the instance of the sheriff. And therefore a mere apprehension upon the part of the sheriff, that the goods belong to some other person, is not a sufficient ground

to warrant the application. *Isaac v. Spilsbury*, 2 Dowl. 211. See *Slowman v. Back*, 3 B. & Ad. 103. So, where merely a notice was given that a fiat in bankruptcy had issued against the defendant, the court of Exchequer held that this was not equivalent to a claim by the assignees, and discharged the sheriff's rule with costs. *Bentley v. Hook*, 2 Dowl. 339. See *Barker v. Phipson*, 3 Dowl. 590, *semb. cont.* So, where the question was, whether one writ of execution should have precedence of another, the court refused to grant a rule. *Day v. Wallock*, 1 Dowl. 523. *Salmon v. James*, *Id.* 369. So, the court will not interfere, merely on the ground of the defendant's landlord claiming, or having distrained for, rent. *Haythorn v. Bush*, 2 Dowl. 641. See *Clarke v. Lord*, *Id.* 227. Nor will the court interfere, where the claim arises out of proceedings in a court of equity. *Sturges v. Claude*, 1 Dowl. 505. *Roach et al. v. William Clark Wright*, 1 Dowl. N. C. 56. But a claim, although by a person having a lien only on the goods seized, will be a good ground for the application. *Ford v. Baynton*, 1 Dowl. 357. And whether the goods be in the possession of the defendant, or of a third person, at the time they are seized by the sheriff, makes no difference. *Allen v. Gibbon*, 2 Dowl. 292. It is the duty of the sheriff, however, before he applies to the court, to make some enquiry into the claims, and to ascertain whether the execution creditor submits to, or intends to contest, them; for if it afterwards appear, by the disclaimer of the parties or otherwise, that they have been brought before the court without reasonable cause, and that there are in fact no conflicting claims, the sheriff will probably be ordered to pay the costs of the parties so disclaiming. See *Bishop v. Hinzman*, 2 Dowl. 166. But it is not necessary that the sheriff, previously to such application, should apply to the parties for indemnity; *Crossley v. Ebers*, 1 Har. & W. 216; nor is he bound to accept such indemnity, if offered. *Levy v. Champneys*, 2 Dowl. 454. If he do however accept such an indemnity, the court will not afterwards entertain any application under this act. *Per Patteson, J.* 4 Dowl. 605, 606. Where a person claims an interest in the goods seized, merely as partner with the defendant, the court will not interfere, under this act: the sheriff in such a case must do his duty, and sell the defendant's interest as partner; and if the plaintiff deny the partnership, and require the whole interest in the goods to be seized and sold under the execution, the court upon application will enlarge the time for the sheriff's making a return to the writ, until the plaintiff give him an indemnity. *Holmes v. Mentze*, 4 Dowl. 300, 5 Nev. & M. 563, 1 Har. & W. 606. Nor will the court interfere, if the sheriff, or under-sheriff, or even a partner of the under-sheriff, be a party, *Ostler v. Bower*, 4 Dowl. 605, 1 Har. & W. 653, or concerned

as attorney or agent for a party; *Dudden v. Long*, 1 Bing. N. C. 299, 3 Dowl. 139; the sheriff must appear to stand quite clear of all connection with the parties. *Id.* The application also must be made promptly, or within a reasonable time after the sheriff has notice of the adverse claim, see *Skipper v. Lane*, 2 Dowl. 784. *Brackenbury v. Laurie*, 3 Dowl. 181, otherwise the court will not relieve him, *Cook v. Allen*, 2 Dowl. 11. *Devereux v. John*, 1 Dowl. 548. *Ridgway v. Fisher*, 3 Dowl. 567, 1 Har. & W. 189, unless the delay be satisfactorily accounted for. *Dixon v. Ensell*, 2 Dowl. 621. *Barker v. Phipson*, 1 Har. & W. 191, 3 Dowl. 590. Nor will the court relieve him, where the seizure of the goods was long before the claim was made, and the delay in executing the writ is not satisfactorily accounted for. *Lashmar v. Claringbold*, 2 Har. & W. 87. Nor can the sheriff apply, after he has sold the goods, and paid over the produce to the execution creditor; for there are no longer any contending claimants; *Scott v. Lewis*, 1 Gale, 204, 4 Dowl. 259. *Inland v. Bushell*, 5 Dowl. 147, 2 Har. & W. 118; and it is immaterial, in this respect, whether the money had been paid over before the sheriff had notice of the claim, *Id.*, or after notice. *Anderson v. Calloway*, 1 Dowl. 636. Nor will the court interfere, after the sheriff has delivered up part of the goods to the party claiming them. *Braine v. Hunt*, 2 Dowl. 391. Nor will the court, in general, upon any other form of application, interfere to relieve the sheriff in cases of execution by *f. fa.*, where he might have made the application under this interpleader act. See *Gibson v. Humphrey*, 1 Crompt. & M. 544. It is not necessary however that any action should be brought against the sheriff, by either of the parties, previously to his applying for the rule to interplead, See 1 & 2 W. 4, c. 58, s. 6, (*ante*, p. 103), *Green v. Brown*, 3 Dowl. 337, as we have seen, (*ante*, vol. 1, p. 266.) is necessary in the ordinary cases of interpleader.

The Rule.] The application must be made to the court, out of which the writ of execution issued; 1 W. 4, c. 58, s. 6, *ante*, vol. 1, p. 270; or to a judge at chambers; 1 & 2 Vict. c. 45. And if there be two writs issuing out of different courts, an application must be made in respect of each. *Bragg v. Hopkins*, 2 Dowl. 151. It is not necessary for the sheriff, in his affidavit, to deny collusion with the parties; *Donniger v. Hinzman*, 2 Dowl. 424. *Dobbins v. Green*, *Id.* 509. *Bond v. Woodhall*, 4 Dowl. 351; although this was formerly doubted. *Cook v. Allen*, 2 Dowl. 11. If after the rule *nisi* is granted, any other claim be made to the goods, the court will allow the sheriff to make the new claimant a party to the rule, and will enlarge the rule for that purpose, if necessary. *Kirk v. Clark*, 4 Dowl. 363.

Upon showing cause against the rule, if the sheriff do not appear to support it, it will be discharged as of course, with

costs. So, if he have unnecessarily brought a party before the court, he will be obliged to pay that party's costs. *Clarke v. Lord*, 2 Dowl. 55. And it may here be necessary to mention that no person can appear upon a sheriff's rule of interpleader, unless he be called upon by the rule to do so, although he have a claim upon the goods seized, and be desirous to litigate that claim with the plaintiff. *Id.* But where the rule called upon the official assignee of a bankrupt to show cause, the creditors' assignees not being then chosen, it was holden that the creditors' assignees could afterwards show cause against the rule, although in form they were no parties to it. *Ibbotson v. Chandler*, 9 Dowl. 250.

If the party claiming, who is named in the rule, and duly served therewith, shall not appear, to maintain or relinquish his claim, or shall neglect or refuse to comply with any rule made after appearance, the court or judge will declare such claimant, and all persons claiming under him, to be for ever barred from prosecuting his claim against the sheriff, saving nevertheless such claimant's right against the execution creditor. See 1 & 2 W. 4, c. 58, s. 3. *Bowdler v. Smith*, 1 Dowl. 417. *Lewis v. Ikey*, 2 Dowl. 222. The court also usually oblige the claimant, in such a case, or his agent claiming for him, to pay the costs of the execution creditor, *Bowdler v. Smith*, *supra*. *Lewis v. Eicke*, 2 Dowl. 337, but see *Oram v. Sheldon*, 3 Dowl. 640, 1 Hodg. 92, but not the sheriff's costs; *Bowdler v. Smith*, *supra*. *Perkins v. Burton*, 2 Dowl. 108; and where the sheriff's rule does not pray costs as against the claimant, the rule for costs as against him, is not absolute in the first instance, but a rule nisi only. *Perkins v. Burton*, *supra*. *Philby v. Ikey*, 2 Dowl. 222. *Shuttleworth v. Clarke*, 4 Dowl. 561, 1 Har. & W. 662.

If, on the other hand, the execution creditor do not appear, he will be barred of all claim as against the sheriff, *Ford v. Dilly*, 5 B. & Ad. 885, 2 Nev. & M. 622, see *Donniger v. Hinxman*, 2 Dowl. 424, *cont.*, or, at least, will be precluded from bringing any action against the sheriff, *Doble v. Cummins*, 7 Ad. & El. 580, and the sheriff, if he have not sold, will be allowed to withdraw from the possession, *Field v. Cope*, 2 Tyr. 458, 1 Dowl. 567, or if he have sold, the court will order him to pay over the produce of the sale to the claimant; *Gethin v. Wilks*, 2 Dowl. 189; and the court will order the execution creditor to pay the costs of the claimant, but not those of the sheriff. *Bryant v. Ikey*, 1 Dowl. 428. *Field v. Cope*, *supra*. *Tomlinson v. Done*, 1 Har. & W. 123. *Beswick v. Thomas*, 5 Dowl. 458, but see *Glasier v. Cooke*, 5 Nev. & M. 680. And if neither the execution creditor nor claimant appear, both will be barred, and the sheriff will be allowed to levy what will pay his poundage and expenses, &c. and then to withdraw from the possession. *Eveleigh v. Salisbury*, 3 Bing N. C. 298.

But if all parties appear, then the court shall hear their allegations, and finally order them to try their rights in an action or feigned issue, and direct which of them shall be plaintiff or defendant in the same. See 1 & 2 W. 4, c. 58, s. 1. Or with the consent of the parties, their counsel or attorneys, the court may dispose of the merits of their claims, and determine the same in a summary way; *Id.*; without such consent, however, the court can only order an issue or action, and cannot enter upon the merits of the case. *Bramidge v. Adshead*, 2 Dowl. 59. *Allen v. Gibbon*, *Id.* 292. *Curlew v. Pocock*, 5 Dowl. 381. But although they cannot enter upon the merits, yet the claimant must state the nature and particulars of his claim, otherwise the court cannot deal with it, and the claimant may be barred; *Powell v. Lock*, 1 Har. & W. 281, 4 Nev. & M. 852; he may do this however without taking copies of the affidavits on which the rule was granted. *Mason v. Redshaw*, 2 Dowl. 595. If it appear that the sheriff has been ruled to return the *f. fa.* and an attachment obtained for not returning it, the court will only make the sheriff's rule absolute, on payment by him of the costs of the attachment. *Almore v. Adeane*, 3 Dowl. 408.

Issue, costs, &c.] If an issue be directed, the proceedings thereon are the same as in other feigned issues in ordinary cases. See *post tit.* "Feigned Issue." The costs of the issue follow the event, *Bowen v. Bramidge*, 2 Dowl. 213, and see *Staley v. Bedwell*, 10 Ad. & El. 145; *Lewis v. Holding*, 9 Dowl. 652, even although the issue have been ordered by a judge at chambers, by consent; *Matthews v. Sims*, 5 Dowl. 234; but the successful party must apply for it by rule *nisi*, or by a judge's order where the issue was directed by a judge. *Burgh v. Schofield*, 2 Dowl. N.C. 261. And where the party obtained his rule *nisi*, without previously making any application to the opposite party, the court made the rule absolute, but without costs of the rule. *Bowen v. Bramidge*, *supra*. Where an issue was directed, and after verdict, but before judgment, the party who was defendant in the issue died, the court refused to allow the judgment to be entered as of a time before the death; they said the seventh section of the statute precluded them from doing so. *Lambirth v. Barrington*, 4 Dowl. 126, 1 Hodg. 205. The rule *nisi* for costs of the issue, may also be for the costs incurred by the successful party by reason of the sheriff's rule; and if it were the fault of the unsuccessful party, that the rule and issue became necessary, the court will order him to pay the costs. *Seaward v. Williams*, 1 Dowl. 528. *Staley v. Bedwell*, 10 Ad. & El. 145. The right of the sheriff to poundage, is suspended pending the issue, and depends upon the event: if the execution creditor succeed, the sheriff will be entitled; but if the claimant succeed, he will

not. *Barker v. Dynes*, 1 Dowl. 169. If the sheriff also have kept possession of the goods, or done any other act, by order of the court, for the benefit of the parties, the court perhaps would allow him the costs of doing so; see *Underden v. Burgess*, 4 Dowl. 104. *Armitage v. Foster*, 1 Har. & W. 208; but not otherwise. *Clark v. Chetwode*, Id. 635. *West v. Rotherham*, 1 Hodg. 461, 2 Bing. N. C. 527.

If instead of proceeding to the trial of the action or issue, the claimant abandon his claim, or otherwise fail to avail himself of the order by which the issue is directed, the court will order him to pay the costs of the execution creditor, up to the time of the abandonment, &c., together with the costs of the rule to pay the money out of court to him, if any have been paid in by the sheriff. *Wills v. Hopkins*, 3 Dowl. 346. *Scales v. Sargeson*, Id. 707. They will also oblige him to pay any expenses incurred by the sheriff in keeping possession, &c. subsequently to the order directing the issue. *Scales v. Sargeson*, 4 Dowl. 231. So if the execution creditor, instead of proceeding with the issue, abandon his claim to levy upon the goods, the claimant will be entitled to his costs in like manner, and the sheriff to his expenses subsequently to the issue being directed. *Dabbs v. Humphries*, 1 Bing. N. C. 412, 1 Hodg. 4, 3 Dowl. 377.

If instead of directing an action or issue, the court, by consent of the parties, refer the matter to the master, the costs are entirely in the discretion of the court; and where, in such a case, after the master's report in favour of the claimant was made and confirmed, it appeared that no blame attached either to the execution creditor, the claimant, or the sheriff, the court refused to give costs to either party. *Morland v. Chitty*, 1 Dowl. 520.

Where the sheriff applies under this statute, and his rule is afterwards discharged, he is allowed a reasonable time after that, for the purpose of making his return; and therefore an attachment against him for not returning the writ, obtained on the very day his rule under this act was discharged, was holden irregular. *R. v. Sh. of Hertfordshire*, 2 Har. & W. 122, 5 Dowl. 144. Where the sheriff, by a rule under this act, was authorised to withdraw from the possession of the goods seized, until the validity of a claim by the assignees of the defendant should be decided, with liberty then to re-enter: and in three years afterwards, the assignees failing to establish their claim, an application was made for a rule requiring the sheriff to enter and sell accordingly; the court said that although the sheriff might, if he would, re-enter under the first rule, yet as he was then out of office, they could not compel him to do so. *Wilton v. Chambers*, 3 Dowl. 12.

The statute also provides (s. 7) that the rules and orders made in such matters may be entered on record, and shall

have the force and effect of a judgment; "and in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by *fi. fa.* or *ca. sa.* adapted to the case, together with the costs of such entry, and of the execution if by *fi. fa.*; and such writs may bear teste on the day of issuing the same, whether in term or vacation." Or the party may proceed for his costs, by suing out execution upon the rule ordering the payment of them, under stat. 1 & 2 Vict. c. 110, s. 18, as directed, *post*, *tit. Rules, &c.*; and which he may do, without entering his rule thus on record. *Cetti v. Bartlett*, 1 Dougl. N. C. 928.

SECTION X.

Set off of judgments and costs.

In different actions.] Where two parties have respectively final judgments against each other, in different actions, in the same or in different courts, whether for debt or damages and costs, or for costs only, either party, upon application, may have the one judgment set off against the other. *Thrustout v. Crafter*, 2 W. Bl. 826. *Lomas v. Mellor*, 5 Moore, 95. *Hall v. Ody*, 2 B. & P. 28. *Peacock v. Jeffery*, 1 Taunt. 426. *Barker v. Braham*, 2 W. Bl. 869, 3 Wils. 396. *Simpson v. Hadley*, 1 M. & S. 696. *Vaughan v. Davies*, 2 H. Bl. 440. If the application be by the party whose judgment is least in amount, it is for a rule to shew cause why, upon entering satisfaction on the party's own record, satisfaction for the like amount should not be entered on the record of his opponent; which will have the effect of lessening the amount for which execution may be issued. See *Barker v. Braham*, *supra*. If the motion be made by the party having the greater judgment, it is for a rule to shew cause why, upon entering satisfaction on his own record for the amount of his adversary's judgment, satisfaction should not be entered on the record of the latter; *Vaughan v. Davies*, *supra*; which will have the effect of preventing the adversary from suing out execution on his judgment, and of allowing the applicant to sue out execution for the balance due to him. This application is always made to the court in which the adversary has obtained his judgment. Where the plaintiff obtained two judgments against the defendant for 816*l.* in the Common Pleas, and the defendant obtained judgment in the King's Bench against the plaintiff for 3,052*l.*, the Common Pleas upon application allowed the defendant to enter satisfaction upon the two rolls there, upon his entering satisfaction to the extent of 816*l.* on the roll in the King's Bench; and this, although the plaintiff were then dead, and her administrator

had sued out elegits, and commenced ejectments, to enforce the judgments. *Brydges v. Symth*, 8 Bing. 29. The court have granted such an application also, although the applicant had his adversary already in custody in execution for the amount of his judgment. *Simpson v. Hadley*, 1 M. & S. 696. But see *Taylor v. Waters*, 5 M. & S. 103. The set off in these cases, however, is subject to the lien of the attorneys of the respective parties. See *ante*, vol. i. p. 80, 81.

The court however will not allow a debt, for which the party has not as yet obtained judgment, to be set off against the judgment and execution of his adversary. *Philippson v. Caldwell*, 6 Taunt. 176. And therefore, where A. had obtained judgment against B., and B. had obtained a verdict against A. which however was suspended by a rule for a new trial, B. was not allowed to set off the amount of his verdict against A.'s judgment. *Garrick v. Jones*, 2 Dowl. 157. The court of Common Pleas, in such a case, stayed execution on the judgment, until the rule for the new trial should be disposed of; *Masterman v. Malin*, 7 Bing. 435; but the court of Exchequer refused this in a similar case. *Johnson v. Lakeman*, 2 Dowl. 646.

And the judgments must substantially be between the same parties. And therefore where in an action for a false return to a *fi. fa.* the sheriff obtained a verdict, it was holden that the plaintiff could not set off his judgment in the original action, against the sheriff's judgment for costs. *Hewitt v. Pigott*, 8 Bing. 61. And see *Holroyd v. Breare*, 4 B. & A. 43, 700. So costs in an action against a bankrupt, cannot be set off against costs recovered by his assignees. *West v. Pryce*, 2 Bing. 455. And see *Doe v. Darnton*, 3 East, 149. But where A. brought an action against B., whose expenses were to be borne by C. and D., and A. was nonsuit: and afterwards C. brought an action against A., in which D. was interested, and was nonsuit: it was holden that the costs of these nonsuits respectively might be set off, one against the other. *O'Connor v. Murphy*, 1 H. Bl. 651. So where several actions upon two policies of insurance were consolidated, and both policies were underwritten by the same parties, among whom were A. and B.; and in one of the causes tried, A. was defendant and the plaintiff became entitled to costs, in the other against B., B. was entitled to costs: it was holden, that the costs taxed for the defendant in the one action, might be set off against the costs taxed for the plaintiff in the other. *Nunez v. Modighiani*, 1 H. Bl. 217. So, costs recovered by A. against B. in one action, have been allowed to be set off against costs recovered by B. against A. C. and D. in another. *Dennie v. Elliott*, 1 H. Bl. 587. *Mitchell v. Oldfield*, 4 T. R. 123. And see *Glaister v. Heuer*, 8 T. R. 69.

In the same action.] If two judgments be obtained by opposite parties in the same suit, the one may be set off against the

other. As where there are several issues, and some are found for the plaintiff, some for the defendant, we have seen (*ante*, p. 58) that the costs of the defendant must be deducted from those of the plaintiff. And if several defendants employ the same attorney, and on one count of the declaration the plaintiff obtain a verdict against one of the defendants, but the other defendants have a verdict generally, the defendants will be entitled to have their costs set off against those of the plaintiff, without regard to the lien of the plaintiff's attorney; *Starling v. Cousins, et al.* 3 Dowl. 782. *George v. Elston, Id.* 419, 1 Hodg. 63. *Lees v. Kendall et al.* 1 Har. & W. 316; particularly where the attorney appears to be substantially the plaintiff in the action. *Pocock v. O'Shaunessy et al.* 6 Ad. & El. 807. So where two defendants suffered judgment by default, and two others proceeded to trial and obtained a verdict, the court allowed the costs and damages in the judgment by default to be set off against the costs of the other two defendants on the *Postea*. *Schoole v. Noble*, 1 H. Bl. 23.

So interlocutory costs may be set off against costs, &c. upon a judgment, without regard to the attorney's lien, *Holliday v. Lawes*, 3 Bing. N. C. 774. *Abernethy et al. v. Paton*, 8 Law, J. 205 cp. *Doe v. Carter*, 8 Bing. 330. *Lang v. Webber*, 1 Price, 375. *Howell v. Harding*, 8 East, 362, or the costs, &c. upon a judgment against interlocutory costs, or interlocutory costs on one side, against interlocutory costs on the other, in the same suit. *Doe v. Alsop*, 9 B. & C. 760. But where a defendant, by a judge's order, was permitted to go to trial, upon payment of a certain sum of money, and the costs up to that time, and he proceeded to trial and obtained a verdict, without complying with the terms of the order, the court refused to allow him to set off his costs against the costs he was to pay the plaintiff under the order, so as to deprive the plaintiff's attorney of his lien. *Aspinall v. Stamp*, 3 B. & C. 108. So where a judgment of more than a year's standing, was unexecuted, and required to be revived by *scire facias* before execution could be sued out upon it, the court refused to allow the plaintiff to set off the judgment, against costs ordered to be paid to the defendant by a subsequent rule. *Doe v. Lord*, 7 Ad. & El. 610. So, where the plaintiff had the defendant taken in execution for the whole amount of his judgment, it was held that he could not afterwards set off the costs under that judgment, against interlocutory costs due to the defendant. *Jeard v. M'Carthy*, 9 Dowl. 136. But in cases where the party is entitled to the set off, the master may do it in taxing costs, without any application to the court for leave to do so. *Paxton v. Wyllie*, 10 Law, J. 292, cp. See as to the attorney's lien, *ante*, vol. i. p. 80, 81.

Costs in equity.] The court of Common Pleas have allowed the costs in a suit in equity, to be set off against the costs of

Sinclair, 5 Dowl. 26. *Caddell v. Smart*, 4 Dowl. 760.
v. Helyer, 2 Dowl. 540.

Where the plaintiff obtained judgment in an action of debt, and at the trial entered into a rule to pay the debt, about which there was a dispute between the parties the action; the court on application allowed the debt to set off this 70*l.* against the plaintiff's judgment. *N. Newton*, 8 Bing. 202.

But where a plaintiff was arrested for the costs of an action on his way home after attending the trial of another cause, and paid 47*l.* in order to get his liberty: the court ordering that sum of 47*l.* to be refunded, refused to allow a defendant to set off his costs against it. *Pitt v. Coombe & W.* 13.

SECTION XI.

Entry of satisfaction on the Roll.

Where the amount of the debt or damages and costs has been paid, the defendant may have an entry of satisfaction made upon the roll. And in trover for title deeds, title upon the application of the defendant allowed satisfaction be entered on the roll, upon the terms of the defendant verifying up the deeds, paying all costs as between attorney and client, and in other respects placing the plaintiff in the same situation as he was before the cause of action arose. *v. Sandon*, 1 D. & R. 201. So, the defendant was allowed to enter satisfaction on the roll upon a judgment obtained against him in the court of King's Bench, on his entering satisfaction.

employed by the plaintiff in the cause, even although he have lien upon the judgment for his costs; but it may be directed to any other attorney, without an order to change the attorney. *Harr v. Smith*, 4 B. & A. 466, and see *Abbott v. Rice*, 3 Bing. 32. See the form of the warrant, *Arch. Forms*, 271; it may be had at the stationer's. Where in an ordinary case of payment of debt and costs, the defendant moved to enter satisfaction on the roll, the court held that it could not be done without this warrant from the plaintiff. *Wood v. Hurd*, 5 Dowd. 88. And where the plaintiff had died, the court refused to allow satisfaction to be entered, on the mere affidavit of the defendant's attorney that the plaintiff had received a certain sum from the defendant in full satisfaction of his demand, it appearing that administration had not been taken out to the plaintiff's effects. *Speach v. Slade*, 8 Moore, 461. Also, where the plaintiff was abroad, so that the warrant could not be obtained, the court were not satisfied with the affidavit of the sheriff's officer that he had levied the amount, and paid it to the plaintiff's attorney, but they required also the affidavit of the plaintiff's attorney to the same effect. *De Bastos v. Willmott*, 1 Hodg. 15.

In the Queen's Bench, a satisfaction piece is made out on parchment, (see the form, in the Appendix;) and this, together with the warrant, is handed to the officer who acts as clerk of the judgments, who after entering them, hands the satisfaction piece to the clerk of the treasury, to be entered on the roll. In the common Pleas, a satisfaction piece is not necessary; but the number of the roll and the day on which judgment was signed, being written in the margin of the warrant, in term time give it to the clerk of the treasury, who will take the roll into court, and the master will enter satisfaction upon it; or in vacation, give it to the officer who acts as clerk of the judgments, who will take out a judge's fiat for the entry, will attend with you before the judge to get it signed, and will then make the entry on the roll. It is scarcely necessary to mention, that the roll must be previously made up and carried in.

CHAPTER VII.

Amendment and writ of error.

SECTION I.

Amendment.

A party cannot amend his own proceedings; the court will not sanction it in any case. Where a writ of summons, when first sued out, was directed to the defendant in Middlesex, it upon its being ascertained that he resided in Surrey,

Surrey was substituted for Middlesex in the writ, and it was served, without being re-scaled: the court said, that the attorney in this instance had been guilty of gross misconduct, and on that ground they set aside the proceedings, on payment of the debt without costs. *Siggers v. Sansom*, 2 Dowl. 745. Where an affidavit was altered after it was sworn, by inserting the words "the paper writing marked A. is a true copy," the court held that the alteration rendered the affidavit a nullity, and that it could not therefore be used. *Wright v. Skinner*, 5 Dowl. 92. Even where an appearance was entered by mistake in a wrong name, and the defendant's attorney, instead of applying to have that amended, entered another appearance in the right name, and signed a non pros for want of a declaration: the court held it to be irregular, and set aside the judgment with costs. *Bate v. Bolton*, 2 Dowl. 677.

But the court or a judge at chambers, will in general give leave to amend, in all personal actions and in ejectment, whenever the justice of the case appears to require it; and in penal actions, as well as in others. *Jones v. Edwards*, 3 Mees. & W. 218.

Amendments are allowed by a judge at chambers, or at the assizes, or by a judge at nisi prius, or by the court: in ordinary cases, before verdict, the amendment required will be allowed by a judge, upon summons; after verdict, the application is usually made to the court; and where the necessity for the amendment is first perceived during the trial of the cause, or immediately before it, as in the case of variance, or the like, the application is made to the judge at nisi prius. It is not required that the application should be made within any particular time; there is no analogy in this respect between it, and an application to set aside proceedings for irregularity. *Welsh v. Hall*, 9 Mees. & W. 14. But if a judge make an order to amend, and the opposite party wish to rescind that order, an application to the court for that purpose must be made promptly. *Baden v. Flight*, 6 Dowl. 177. As these amendments are entirely in the discretion of the judge granting them, the court will seldom interfere with the decision of a judge upon the subject; indeed they have, in more than one instance, doubted their authority to do so. See *R. v. Archbishop of York*, 3 Nev. & M. 453. *Doe v. Errington*, Id. 646, 651. *Vide post*. Amendments are usually granted upon payment of costs, and upon such other terms, as to pleading, taking short notice of trial, &c., as the judge shall think reasonable. But this is entirely discretionary with the judge granting the amendment. See *Wall v. Lyon*, 1 Dowl. 714. *R. v. Archbishop of York*, *supra*. If the amendment be granted upon payment of costs, the party entitled to them, if he wish to proceed in the action, should demand them, and if not paid, he may apply to rescind the order; or if the other party amend, without paying the

costs, and attempt to proceed in the action, a judge upon summons will stay his proceedings; but no attachment will lie for the non-payment of these costs, as the order is merely conditional. *Turner v. Gill*, 3 Dowl. 30. The party obtaining the order, however, may abandon it, if he will, not choosing to amend upon the terms imposed; and in that case he may proceed in the action in the same manner as if such order had never been applied for or granted. *Black v. Sangster*, 1 Cr. M. & R. 521. But he cannot get it altered, or have any part of it rescinded, after he has served it, or otherwise acted upon it. *Ciraud v. Austen*, 1 Dowl. N. C. 703.

The judges are usually very liberal in granting an amendment, where the justice of the case requires it; except in hard actions; in cases where the amendment would affect the rights of third parties, such as bail, &c.; and in cases of deviation from the forms, &c. under the uniformity of process act and the new rules, with which they usually exact a strict compliance. All this shall presently be noticed more fully.

Amendment in particular instances.

Abatement, pleas in.] The court will not allow of an amendment in a plea in abatement, as it has no reference to the merits, and merely has the effect of delaying the suit. *Atkinson v. —* Gent. 2 Chit. 5. *Anon.* 1 Tidd. 690.

Affidavit.] An affidavit cannot be amended, in substance or in form, *Wood v. Stephens*, 3 Moore, 236, unless it be re-sworn; and then it has effect only from the date of the new jurat. See *post tit.* "Affidavit." But where an affidavit on which a rule nisi had been obtained, appeared to be defective in the jurat, and upon showing cause, another affidavit exactly the same, but with a correct jurat, was produced, the court allowed the rule to be enlarged, on filing the second affidavit, and paying the costs of the appearance of the other party to show cause. *Goodricke v. Turley*, 2 Cr. M. & R. 637. And where affidavits, to be used on showing cause against a rule, are found to be defective in any formal part, the court may give leave to have them amended and re-sworn, and adjourn the hearing of the rule in the mean time; *Anderson v. Ell*, 3 Dowl. 3; and this, even although the time for filing a fresh affidavit would have expired. *Ex p. Hall*, 8 Law J., 211, *qb.*

Appearance.] An appearance may be amended. Where the plaintiff entered an appearance for the defendant by a wrong name, it was amended, even after declaration. *Whetton v. Ackman*, 3 Wils. 49. So, where the defendant enters an appearance in a wrong name, it may be amended; but where, instead of applying to have it amended, he entered a new ap-

pearance, and afterwards signed judgment of non pros for want of a declaration, the court held his proceedings to be irregular, and set aside the judgment. *Bate v. Bolton*, 2 Cr. M. & R. 365.

Avowry, &c.] Avowries may be amended. *Brown v. Sayce*, 4 Taunt. 320. The court have allowed them to be amended, in the description of the premises, the terms of the holding, &c.; and they have even allowed new avowries to be added, varying the amount of rent, &c., although issue had been joined, and notice of trial given and countermanded, and although more than two terms had elapsed since the former avowries were pleaded. *Prior v. Duke of Buckingham*, 8 Moore, 584.

So, leave has been given to amend pleas in bar to an avowry, after argument on demurrer. *Mattravers v. Ponsil*, 3 Wils. 295.

Bail.] The bail piece may be amended, *Anderson v. Neale*, 1 B. & P. 31, upon a re-acknowledgment by the bail; *Craft v. Coggs*, 4 Moore, 65; but not without their consent, *Bingham v. Dickie*, 5 Taunt. 814, it being a general rule with the judges, not to allow of an amendment, to cure any irregularity, of which the bail may take advantage. *Fulwood v. Annis*, 3 B. & P. 321. The court have also refused to amend a bail-piece in error, where it would have the effect of defeating an execution. *Reed v. Cooper*, 5 Taunt. 320.

So, the court will not amend the recognizance of bail, unless with the consent of the bail, *Tabrum v. Tenant*, 1 B. & P. 481. See *Hartley v. Hodson*, 1 Moor, 814, or at their instance, *Halliday v. Fitzpatrick*, 4 Taunt. 875. See *Bottomley v. Medhurst*, 13 Price, 589, or where the defect has arisen from a mere mistake of the officer of the court. *Mann v. Calow*, 1 Taunt, 221, and see *Christie v. Walker*, 1 Bing. 206. And in an action on the recognizance, they have refused to amend it, after issue joined on *nul tiel record*. *Venn v. Warner*, 3 Taunt. 263.

So, in a *scire facias* against bail, although the court may order an amendment, if they will, *Perkins v. Petit*, 2 B. & P. 275, yet they usually refuse it, upon the ground that they will not cure an irregularity, of which the bail may take advantage. *Fulwood v. Annis*, 3 B. & P. 321. And the same as to the declaration on the *scire facias*. *Stevenson v. Grant*, 2 New R. 103.

If the bail, however, require an amendment, the court in most cases readily grant it. But they will not so readily grant an amendment in an affidavit of justification of country bail, as the liability of the bail has not then commenced, and the affidavit is deemed a proceeding entirely upon the part of the defendant. See *Burford v. Holloway*, 2 D. & R. 362. And in all cases, where such an affidavit states that the bail are "pos-

used of," instead of "worth," property to the required amount, (a mistake which has become very usual), the court Exchequer have made it a rule not to allow the affidavit to be amended. *Naylor's Bail*, 3 Dowl. 452, and see *Workison's* 2il, 2 Dowl. 53.

Capias.] Formerly the court or a judge, upon application, could allow a writ of mesne process to be amended, *Stevenson Danvers*, 2 B. & P. 109. *Adams v. Luck*, 3 Brod. & B. 25. *arty v. Ashleigh*, 2 W. Bl. 918, even after issue joined, *Carr Shaw*, 7 T. R. 299, if the amendment would not have the effect of charging the bail, *Inman v. Huish*, 3 New R. 133, or preventing the defendant from proceeding in an action for his imprisonment for an arrest under it; *Anon.* 1 Tidd. 160; unless, indeed, the defect in the writ rendered it a nullity altogether. *Kenworthy v. Peppiat*, 4 B. & A. 288.

But now, as the form of the writ is given by statute, and persons must know that they are bound strictly to conform to it, the court will not allow an amendment of a *capias*, *Colston Berens*, 3 Dowl. 253, unless the plaintiff would otherwise be deprived of his remedy. *Bilton v. Clapperton*, 1 Dowl. C. 386. Nor will they amend the copy of the writ, which is delivered to the defendant upon his arrest, where it varies from the writ. *Byfield v. Street*, 2 Dowl. 739. See *Hodgkinson v. Hodgkinson*, 3 Nev. & M. 564. In the indorsement on the writ, however, the court will allow of an amendment, upon payment of costs; formerly in that part of the statement of the amount of debt and costs, which stated that if the amount were paid within four days "from the service hereof," proceedings should be stayed, if, instead of the word "service," the word "execution" were used, (which was a very usual stake), the court would allow it to be amended, on payment of costs. *Urquhart v. Dick*, 3 Dowl. 17. *Shirley v. Jacobs*, 101. *Cooper v. Waller*, *Id.* 167. So, where there was a variance between the order for holding to bail, and the indorsement upon the writ, in the sum, the order being for 422l., and indorsement 422l. 13s. 4d., the court refused to discharge the defendant on that account, and ordered the indorsement on the writ to be amended. *Plock et al. v. Pachico*, 9 Mees. & W. 342. If a writ be filed of record, and there be a mistake in the reading of it, the court will allow it to be amended, according to the truth. *Green v. Rennett*, 1 T. R. 782.

Declaration.] The court will allow a declaration to be amended, in the title; *Coutanche v. Le Ruez*, 1 East, 133; *Symonds v. Parmenter*, 1 Wils. 256; in the name of the plaintiff; *Wardner v. Walker*, 3 Anst. 935; see *Freen v. Cooper*, 6 Taunt. 8; but see *Moody v. Aslatt*, 3 Dowl. 486; in the name of the defendant; *Owens v. Dubois*, 7 T. R. 698, and see *Horton v.*

Stamford, 2 Dougl. 96; in adding the name of a plaintiff, *pro forma*; *Lakin v. Watson*, 2 Dougl. 633. *Baker v. Newer*, 1 Cr. & M. 112; in striking out the name of one of several defendants, on payment of his costs; *Palmer v. Beale et al.*, 9 Dougl. 529; in substituting for an averment of notice of dishonour, a statement that the defendant had dispensed with it, in an action on a bill of exchange; *Burgh v. Legge*, 8 Law J., 258 *ex.*; in adding new counts for the same causes of action; *Freem v. Cooper*, 6 Taunt. 358. *Brown v. Crump*, 6 Taunt. 300. *R. v. Archbishop of York*, 3 New & M. 453. *Legge v. Boyd*, 8 Dougl. 272, 9 Law J., 170, *cp.*; in striking out counts; *Aylwin v. Todd*, 1 Bing. N. C. 170, *see Tomlinson v. Nanny*, 2 Dougl. 17. *Tenour v. Smith*, 1 Ld. Ken. 141; and formerly even in the very form of action, changing it from assumpsit to debt, or the like: *Billing v. Flight*, 6 Taunt. 419, 422: in ordinary cases, at any time whilst the proceedings remain in paper, *Havers v. Bannister*, 1 Wils. 7. *Horston v. Shilliter*, 6 Moore, 490, provided the amendment have not the effect of again charging the bail, if they have been already discharged by reason of the defect. *Levett v. Kibblewhite*, 6 Taunt. 483. They will amend a declaration also, in the damages laid, or the amount of debt stated in each count, if the application be made before the trial. *Dew et al. v. Katz*, 8 Car. & P. 315. But the court will not amend the declaration after verdict, by increasing the amount of the damages laid, without sending the case to a new trial, even although it appears evident on the face of the declaration that the damages were laid too low by mistake. *Tomlinson v. Blacksmith*, 7 T. R. 132, *and see Pearce v. Cameron*, 1 M. & S. 675, *but see Tibbs v. Barron*, 12 Law J., 33, *cp.* And the court of King's Bench refused to amend the declaration, after a motion made to arrest the judgment for the defect sought to be amended. *Collins v. Gibbs*, 2 Burr. 899.

As to the time for pleading, after an amendment of the declaration has been allowed, *vide ante*, vol. 1, p. 277. In the Queen's Bench, the defendant may demur specially to the amended declaration, although before the amendment he was under terms to plead issuably, &c. *Children v. Mannering*, 8 Dougl. 120.

Declaration in ejectment.] The court will allow a declaration in ejectment to be amended, in the same manner as an ordinary declaration in other cases. They have allowed an amendment by altering the day of the demise, *Doe v. Miller*, 1 Chit. 536. *Doe v. Pilkington*, 4 Burr. 2447, even in ejectment for a forfeiture. *Anon.* 1 Chit. 536. They will allow the term in the demise to be enlarged, if it appear to them to be necessary to answer the ends of justice. And therefore, where the term expired, whilst the cause was suspended by a writ of error and

unction, the court allowed the declaration to be amended, enlarging the term. *Vicars v. Haydon, in error, Cowp.* 841. If where a very long period has elapsed, the court will not interfere, *Doe v. Tuckett*, 2 B. & A. 773, unless they are well satisfied that they shall not be working injustice by doing so. *Adney v. Hasselden*, 1 B. & C. 121, and see *Doe v. Rendell*, Chit. 535. They have amended the declaration, by striking out the word "tenements," even after judgment, and error sought. *Anon.* 1 Chit. 537. They have even allowed a new count to be added, on another demise, after three terms had passed, and the roll made up and carried in. *Doe v. Armitage*, D. & R. 173. So, they have allowed the notice at foot of a declaration to be altered, after service, by substituting Hilary for Michaelmas term, *Doe d. Bass v. Roe*, 7 T. R. 469, and adding the words "you will be turned out of possession of the same," which had been omitted. *Doe d. Darwent v. Roe*, Dougl. 336.

Enquiry, writ of, &c.] The court will amend a writ of enquiry, by the award of it upon the roll. *Johnson v. Toulmin*, East, 173. *Pippet v. Hearn*, 1 D. & R. 266. They have also amended an inquisition, by adding damages, where the addition was necessary to entitle the plaintiff to costs, namely, in writ for the single value of tithes. *Bale v. Hodgetts*, 1 Bing. 2.

Error, writ of, &c.] A writ of error, although in the nature of a commission, is amendable, by stat. 5 G. 1, c. 13. *R. v. Williams*, 1 Ld. Ken. 470. It may be amended in the names of the parties, see *Barnard v. Guy*, 2 Smith, 259, or by adding striking out the name of a party, *Verelst v. Rafael, Cowp.* 5, and see *Binns v. Pratt*, 1 Chit. 369, or by changing the name of action, *Sampayo v. De Payba*, 5 Taunt. 82, and the venue. The transcript also may be amended; *Daubers v. Pender*, Wils. 337; and where the clerk of the errors, having made a mistake in transcribing the record, and error being assigned on that cause, amended the transcript himself, without asking the leave of the court: the court refused to order the transcript to be restored to the state in which it was when the clerk assigned his errors. *Randole v. Bailey*, 1 M. & S. 232.

Execution.] The court will in general amend a writ of execution, where the amendment will work no injustice. They have accordingly amended it, in the return, *Atkinson v. Newnham*, 2 B. & P. 336, in the names of the parties, *Mackie v. Newnham*, 4 Taunt. 322. *Newnham v. Law*, 5 T. R. 577. *Anon.* Chit. 350 n, in the sum recovered, *Laroche v. Wasbrough*, 2 R. 737. *Arnell v. Weatherby*, 1 Cr. M. & R. 831. *McCorke v. Melton*, 3 Nev. & M. 881, in the cause of action, *Bick-*

nell v. Wetherell, 1 *Ad. & El. N. C.* 914, and in other respects, see *Simon v. Gurney*, 5 *Taunt.* 605, even after the writ had been executed. *Hunt v. Kendrick*, 2 *W. Bl.* 836. *Mackie v. Smith*, 4 *Taunt.* 322. So, where the writ varied from the judgment, the court ordered it to be amended. *Shaw v. Maxwell*, 6 *T. R.* 450. So, where instead of a testatum *fi. fa.*, a *fi. fa.* was directed to the sheriff of a different county from that in which the venue was laid, and the plaintiff, in order to remedy the irregularity, sued out a *fi. fa.* to the proper sheriff, and had it returned *nulla bona*: the court, upon application, allowed the first writ to be amended, so as to make it a testatum *fi. fa.*, although the writ last sued out appeared to be returnable several days before the judgment was signed. *Mays v. Ring*, 1 *H. Bl.* 541. *Courperthwaite v. Owen*, 3 *T. R.* 657. But the court have refused to amend a *fi. fa.* in this way, where the application was not made until the defendant's death. *Phillips v. Turner*, 6 *Bing.* 237, or until after the defendant had moved to set aside the writ for irregularity. *Towers v. Newton*, 1 *Ad. & El. N. C.* 319. So they have refused to amend a *fi. fa.* where it appeared that the defendant had become bankrupt, and that without the amendment the property seized under the writ would go to his assignees; *Hunt v. Peman*, 4 *M. & S.* 329. *Webber v. Hutchins*, 8 *Mees. & W.* 319; nor will they do it in any case where the amendment will affect the rights of third parties. *Id.* And therefore, where the sheriff obtains an interpleader rule, if an application be made to amend the writ or the sum indorsed upon it, the claimant, &c. must be made parties to the rule. *Hammond v. Navin*, 1 *Dowl. N. C.* 351. So they have refused to enlarge the return of an eligit, where the application was made by the sheriff, without the privity or consent of the plaintiff. *Hildyard v. Baker*, 1 *Cr. & M.* 611.

The court have, under peculiar circumstances, ordered the sheriff's return to a writ of execution to be amended, although the application was made by the plaintiff, and not by the sheriff. *Green v. Glassbrook*, 2 *Bing. N. C.* 143. See *Rowe v. Tapp*, 9 *Price*, 347. But it has been refused even to the sheriff, where the application was not made until after an action brought against him for a false return, in which he was under terms to plead issuably, and the amendment would have the effect of raising a totally different issue from that intended. *Wylie v. Pearson*, 1 *Dowl. N. C.* 807.

Habeas corpus.] A writ of habeas corpus, sued out by a prisoner, was amended upon application, by altering the teste from the 1 *Vict.*, to the 7 *W. 4.* *Exp. Davies*, 4 *Bing. N. C.* 17.

Issue.] If the issue delivered be defective, the court will give the plaintiff leave to amend it. Where the plaintiff obtained

and served the usual order to try a cause before the sheriff, but delivered his issue in the ordinary form, as an issue at nisi prius, and not in the form prescribed in such cases by the rule of court: upon a motion to set aside the issue and notice of trial for this irregularity, the court gave the plaintiff leave to amend, upon payment of costs. *Attwill v. Baker*, 5 Dougl. 462. So where the issue varied from the writ of trial, and there was no blanks left in it when delivered, the court gave leave to amend it even after verdict. *Watts v. Ball*, 1 M. & Gr. 208.

Judgment.] A judgment may be amended, not only in the form of which it is given, but at any time afterwards, whether the mistake be deemed the error of the clerk, or otherwise. *Baker v. Dansey*, 4 M. & S. 94. Even after error brought and errors assigned, the court have amended the judgment. *Rees v. Morgan*, 3 T. R. 349. *Paddon v. Bartlett*, 1 Har. & W. 286. Where, in an action against an executor, the judgment by mistake was entered *de bonis propriis* instead of *de bonis testatoris*, the court allowed it to be amended, after error brought. *Per Buller J. in Green v. Rennett*, 1 T. R. 783. Where in replevin the jury found for the defendant, but instead of finding the amount of the rent or the value of the cattle, gave the defendant damages, and he entered up his judgment accordingly: the court, after error brought and errors assigned, allowed the defendant to alter his judgment into a judgment *pro retorno habendo*. *Rees v. Morgan*, 3 T. R. 349. But the court have refused to amend a judgment, to the prejudice of an executor, which two terms before had passed for him on demurrer. *Prince v. Nicholson*, 6 Taunt. 45.

Jury process.] The court will amend the jury process, if there be any thing to amend by. And therefore, where the venire was tested on the 4th June, returnable on the 6th, but the distringas bore teste on the 2nd November, returnable on the 17th June, unless the Lord Chief Baron should come on the 15th June, and the cause was tried on the 25th June: the court allowed the distringas to be amended in its teste and return, upon payment of costs of the rule, and of a writ of error which had been brought. *Cheese v. Scales*, 12 Law J., 14, *et seq.*

Nisi prius record.] Where at the trial of an ejectment, it appeared from the memorandum in the nisi prius record that the action was commenced in 1798, whereas the time limited for bringing the action expired 1796; in fact, the action was commenced in 1792, but there was no proof of that at the trial; however, a verdict passed for the plaintiff, with liberty to the defendant to move to enter a nonsuit: but in the following term the plaintiff moved to amend the plea and nisi prius record, and the court granted it. *Doe v. Dolman*, 7 T. R. 618.

So, the memorandum has been allowed to be altered, by inserting the real day, after error brought, and although the amendment was for the purpose of obviating the error assigned. *Dickinson v. Plaisted*, 7 T. R. 474. But where the trial took place after the day of nisi prius, the court refused to allow this to be remedied, by amendment of the nisi prius record and jury process, because the trial was *coram non iudice*. *Crowder v. Rooke*, 1 Wils. 144.

Orders at nisi prius.] The court cannot amend an order made by a judge at nisi prius, unless it have been made a rule of court. *Cranch v. Trigoning*, 5 Dowl. 230. The court of Common Pleas have refused to amend an order of reference, made at nisi prius, although the mistake was that of the associate, in drawing up the order as for a reference of all matters in difference, instead of a reference of the cause only. *Rawtree v. King*, 5 Moor, 167, but see *Evans v. Senor*, 5 Taunt. 663. But in a late case, *Littledale, J.*, after consulting with the other judges, allowed an order of reference to be amended, in the name of the defendant, by changing it from "James Thomas" to "Thomas James." *Price v. James*, 2 Dowl. 435.

Particulars of demand.] Particulars of demand or set off may be amended as a matter of course, at the instance of the party who delivered them. Where in an action in the Exchequer, the particulars delivered with the declaration on the 27th of May, were by mistake intituled in the King's Bench; on the 30th new particulars were delivered, properly intituled, and were received by the defendant's attorney without objection; and on the 3d June the plaintiff signed judgment as for want of a plea, the time for pleading (supposing there to have been no mistake as to the particulars) having expired on the 1st: the court held that as the defendant's attorney received the particulars, they must be deemed a substitution for those first delivered; that the time for pleading therefore was not thereby extended, and the judgment was correct. *Jones v. Fowler*, 4 Dowl. 232.

Penal actions.] The court will amend in penal actions, in precisely the same manner as in other actions, *Maddock v. Hammett*, 7 T. R. 55. *Dover v. Mestaer*, 4 East, 435. *Jones v. Edwards*, 3 Mees & W. 218, even although the time for bringing a new action may have expired, *Cross v. Kays*, 6 T. R. 543. *Petre v. Croft*, 4 East, 433, provided there have been no great and unnecessary delay, *Goff v. Popplewell*, 2 T. R. 707. *Steel v. Sowerby*, 6 T. R. 171. *Ranking v. Marsh*, 8 T. R. 30, and the amendment introduce no new cause of action. *Maddock v. Hammett*, 7 T. R. 55. *Wright v. Ager*, 5 Moore, 330. *Per Aston*, J. 4 Burr. 2834. The court therefore

plication in a penal action, have amended the writ; *Murray*, 1 W. Bl. 462; they have amended the declaration. 1 Wils. 256, in the name of the defendant, *Mestaer*, 3 M. & S. 450, in the time for payment of notes, in an action for usury, *Maddock v. Hammett*, 7 T. R. 55. *Bondfield v. Burr*, 2 Burr. 1098, in the amount of the sum lent, *Mace v. Burr*, 4 Burr. 2833, in the name of the party entitled to the debt, *Solomons v. Jenkins*, 2 Chit. 23, and in the venue. *Croft*, 4 East, 433, *Dover v. Mestaer*, 4 East, 435. They have also amended the record in a penal action, after judgment, by inserting the similiter; *Wright v. Horton*, 6 M. & S. 100. They have also amended the verdict, by making it conformable with the judge's directions. *Manners v. Postan*, 3 B. & P. 343. But they have not allowed a plaintiff in a penal action to amend, after judgment, where the action was brought to recover a penalty which appeared to have been a mere inadvertence upon the part of the defendant. *Matthews v. Swift*, 1 Bing. N. C. 735.

It has now been said, has relation only to actions by indictment. An action by a party grieved, is as much favoured by the law as any other ordinary action. Therefore where a plaintiff commenced an action of assumpsit, to recover back the money paid on stock-jobbing transactions, and it was afterwards found that the action should have been debt, and not assumpsit: the court permitted the plaintiff, after six terms elapsed from the commencement of the action, to amend the declaration, by making it a declaration in debt. *Billing v. Taunt*, 4 Taunt. 419.

[Pleas in bar may be amended; pleas in abatement, if not taken, cannot. See ante, p. 115. The court have allowed a plea in bar to be amended, even after the trial of the action. *Gordon*, 2 Chit. 27. And they have allowed an executor to amend a plea of a judgment, by increasing the sum alleged to be recovered, nearly three years after the judgment had been made up. *Skutt v. Woodward*, 1 H. Bl. 238. Where an executor pleaded a judgment, to which the plaintiff set out the *nul tiel record*: the court, under peculiar circumstances, allowed the defendant to amend, although the application was not made, until the plaintiff had moved for judgment. *Roberts*, 2 Dowl. 698. It is an ordinary practice, also, to amend a plea is demurred to, to give the defendant leave to amend upon payment of costs, at any time before judgment is pronounced, see *Cooper v. Phillips*, 3 Dowl. 196. *v. Ford*, 3 Wils. 14, and under favourable circumstances afterwards. *Atkinson v. Bayntun*, 1 Bing. N. C. 740. The court also have allowed pleas to be amended, after issue joined and witnesses examined on the part of the plaintiff in interrogatories. *Hollingsworth v. Briggs*, 4 Dowl. 643. They have also allowed a plea of bankruptcy *puis darrein conti-*

nuance to be amended. They will also allow a plea or pleas to be added, even after issue joined. *Huber v. Steiner*, 2 Dowl. 781. They have allowed a defendant to add a plea, that there was no contract in writing, within the meaning of the statute of frauds, under circumstances. *Smith v. Dixon*, 1 Har. & W. 668. But in an action for slander, after verdict for the plaintiff, the court refused to allow the defendant to add a plea of justification upon any terms. *Kirby v. Simpson*, 3 Dowl. 791.

Records.] A record may be amended, even after error brought, and those very defects assigned for error, which are sought to be amended. *Dunbar v. Hitchcock*, 3 M. & S. 591. *Dickinson v. Plaisted*, 7 T. R. 474. This subject we have already considered, when treating of the amendment of judgments, declarations, &c.

Where a similiter has been omitted, the court, after verdict, will allow the record to be amended, by adding it, in all cases where it accords with the justice of the case that they should do so. *Reeder v. Bloom*, 2 Bing. 383. *Sayer v. Pocock*, Cowp. 407. *Wright v. Horton*, 6 M. & S. 50. *Siboni v. Kirkman et al.* 3 Mees. & W. 46. And see *Clark v. Nicholson*, 6 Car. & P. 712. Or where the preceding pleading ends with an *et cetera*, that will be deemed to supply the omission. *Brook v. Finch et al.* 6 Dowl. 313. *Handford v. Handford*, Id. 473.

Or if, to a pleading concluding with a verification, the opposite party, instead of traversing it, add the similiter: if a verdict be found against such party, the court will not on this ground set aside the verdict, but will allow the record to be made perfect by amendment; *Grundy v. Mell*, 1 New Rep. 28. See *Ferrers v. Weal*, 2 Moore, 215; but if the verdict be found for such party, all the court can do for him is, instead of awarding a repleader, to allow him to amend, and so proceed to a new trial, upon payment of costs. See *Wordsworth v. Brown*, 3 Dowl. 698. But where, to debt on an Irish judgment, the defendant pleaded satisfaction, and *nil debet*, and the plaintiff joined issue on the *nil debet*, but did not notice the other plea, and the defendant then added a similiter as if the plaintiff had replied: the plaintiff having obtained a verdict, the court refused to set it aside, because the defendant might have had the full effect of his plea of satisfaction, by evidence under the general issue; and they allowed the plaintiff to amend, by adding a replication, denying the satisfaction. *Cooke v. Barker*, 5 Taunt. 164.

Replication.] The court will amend a replication, in the same manner as other pleadings. They have allowed a replication to be amended, by changing it from *De Injurid* to *Mollior manus imposuit*. *Law v. Newland*, 1 Wils. 76. So, where to a plea of payment, the plaintiff replied damage ultra, the court

allowed him afterwards to amend his replication and accept the money in satisfaction, upon payment of the defendant's costs incurred subsequently to the payment of the money into court. *Kelly v. Flint*, 5 Dowl. 293. And where there was a bad replication to a sham plea, the court allowed the plaintiff to amend, even without payment of costs. *Solomons v. Lyon*, 1 East, 369.

Rules.] A rule nisi may be amended, at any time before it is served. When cause is shown against it, the court are not bound to make it absolute in its terms, but they may mould the rule absolute in what form they please. And if the officer commit any mistake in drawing up the rule, if it can be rectified from the indorsement of counsel on their briefs, or by the recollection of the court, the court will order it to be amended. But the court will seldom entertain an application to add terms to a rule already made absolute, which were not brought under their consideration when the rule was discussed. See *Lopez v. Tastet*, 8 Taunt. 712.

Scire facias.] If scire facias on a judgment, or the declaration thereon, &c. vary from the judgment, the court will allow it to be amended. *Braswell v. Jeco*, 9 East, 316. See *Klos v. Dodd*, 4 Dowl. 67, 1 Har. & W. 342. And where in a scire facias to revive a judgment, the award of execution, and the *ca. sa.* thereon, varied from the judgment, in the christian name of the plaintiff: Littledale, J. allowed them to be amended, even after the *ca. sa.* was executed. *Thorpe v. Hook*, 1 Dowl. 501.

Summons, writ of.] The court will not allow a writ of summons to be amended, unless it appear that the debt will otherwise be barred by the statute of limitations, *Partridge v. Wallbank*, 1 Mees. & W. 316. *Lakin et al. v. Watson*, 2 Cr. & M. 685. *Eccles v. Cole*, 8 Mees. & W. 537, and see *Moody v. Aslatt*, 1 Cr. M. & R. 771. *Green et al. v. Kettibby*, 9 Law J., 228, *ex.*, or unless the amendment be merely to make the writ agree with the præcipe; *Kirk v. Dolby*, 6 Mees. & W. 636; but they cannot order an amendment of the copy served, having no control over it. *Eccles v. Cole*, *supra*. They will not allow even the indorsement to be amended, in the sum mentioned in it, in order that the parties may proceed to a trial before the sheriff. *Trotter v. Bass*, 1 Bing. N. C. 516, 3 Dowl. 407. See *Edge v. Shaw*, 4 Dowl. 189, *semb. cont.* Where a writ of summons was directed to the defendant in Middlesex, but the plaintiff's attorney afterwards, ascertaining that the defendant resided in Surrey, substituted the word "Surrey" for "Middlesex," and served the writ, without having it resealed: the court said that the attorney had been guilty of gross miscon-

duct, and they therefore set aside the proceedings, on payment of the debt without costs. *Siggers v. Sansom*, 2 Dowl. 745.

Verdict.] The verdict may at any time be amended by the judge's notes; *Ernest v. Brown*, 4 Bing. N. C. 162; or by the sheriff's notes, in a case tried before him. *Walker v. King*, 6 Law J., 184, *ex.* This is usually done where a general verdict is given, and the plaintiff, finding after the trial that some of the counts in his declaration are bad, wishes to have the verdict entered upon those which are good. Leave to amend the *postea* in this respect will be given, where it appears from the judge's notes that the jury calculated the damages on evidence applicable to the good counts only, *Eddowes v. Hopkins*, 1 Doug. 376, although evidence may have been given applicable to the bad counts also. *Williams v. Breedon*, 1 B. & P. 329; but see *Empson v. Griffin*, 11 Ad. & El. 186. So, in ejectment for a messuage and tenement, the court gave leave to confine the verdict to the messuage alone, according to the judge's notes. *Goodtitle v. Otway*, 8 East, 357. So, where there is a misjoinder of counts, and a general verdict given, if the jury have calculated their damages with reference to one count only, the *postea* may be amended by entering the verdict on that count, by which means the misjoinder will be cured. *Harris v. Davis*, 1 Chit. 623. And even where a jury gave their verdict for the plaintiff on the general issue only, without noticing another issue on the statute of limitations, the court allowed it to be amended by the judge's notes. *Petrie v. Hannay*, 3 T. R. 659, and see *Isles v. Turner*, 3 Dowl. 211. And this may be done, even after error brought and errors assigned; *Doe v. Perkins*, 3 T. R. 749; and in one case it was done, after the case had been argued in the court of error. *Richardson v. Mellish*, 3 Bing. 334, 7 B. & C. 819, but see *Harrison v. King*, 1 B. & A. 161. But the court have refused to do this, at the instance of the defendant, even although the general finding were contrary to the direction of the judge. *Spencer v. Gotes*, 1 H. Bl. 78. *Reece v. Les*, 7 Moore, 269. And in a penal action, where there was a verdict for one penalty, and the plaintiff elected to enter it upon a particular count, but afterwards finding that count bad, he applied for leave to enter it on another count, to which the evidence was equally applicable: the court refused it, saying that they could not allow it to be done in a penal action. *Holloway v. Bennett*, 3 T. R. 448.

But the court will never amend the *postea*, by increasing the damages given by the jury, even although the jury join in an affidavit that they intended to give the increased sum, and thought that the verdict as delivered had the effect of giving it. *Jackson v. Williamson*, 2 T. R. 281. As for instance,

where in debt upon a mortgage deed, a verdict was taken by mistake for the principal only, without the interest, the court refused to increase it, although the action was undefended. *Baker v. Brown*, 2 Mees. & W. 199. So in an action for not setting out tithes, where the jury found damages for the single value only, the court held that they could not amend the *postea* by entering the verdict for the treble value. *Sandford v. Porter*, 2 Chit. 351. If, on the other hand, the jury give greater damages than are laid in the declaration, the court will allow the plaintiff to enter a *remittitur* for the excess, even after error brought. *Usher v. Dansey*, 4 M. & S. 94. *Pickwood v. Wright*, 1 H. Bl. 642.

The application to amend the *postea*, may be made to the judge who tried the cause, whether he be a judge of the court in which the record is made up, or not; *Doe v. Perkins*, 3 T. R. 749; and, indeed, must be made to him, and not to the court. *Per Abbott J.*, in *Harrison v. King*, 1 B. & A. 163. *Scougull v. Campbell*, 1 Chit. 283. *Ernest v. Brown*, 4 Bing. N. C. 162, and see *Sandford v. Alcock*, 12 Law J., 40, *ex.* But where a verdict is given subject to an award, the plaintiff, after the award is made, may alter the verdict accordingly, without making any application to the court or judge for leave to do so. *Grimes v. Naish*, 1 B. & P. 480. Where upon a case coming on for argument in the Exchequer Chamber, it was found that one of the errors assigned was for a defect in setting out the matter of the *postea* in the record, an error which the court below would have amended as of course: the court of error allowed the transcript to be amended in this respect, on payment of the costs of the day. *De Tastet v. Rucker*, 3 Brod. & B. 65.

Writ of trial.] Where the date of the writ of summons did not appear in the writ of trial, the issue did not recite the writ of summons or award of the venire, the award of the venire in the writ of trial stated the debt to be above 20*l.*, and the writ of trial did not recite when or out of what court it issued, and it bore no date,—the court, after verdict for the plaintiff, ordered the issue and writ of trial to be amended in these respects, upon payment by the plaintiff of the costs of the application which had been made to set them aside. *Emery v. Howard*, 1 Dowl. N. C. 426.

Amendment at the trial.

By consent, &c.] If an amendment be required at nisi prius, even after the cause is called on, and both parties consent to it, the judge upon application will allow it to be made, however material it may be. *Murphy v. Marlow*, 1 Camp. 57. Or, in matters of trifling importance, he may allow of the

amendment at the instance of one party, whether the other consent to it or not. *Freeman v. Cockell*, 1 Car. & P. 137. But where the amendment required was in a matter of substance, as where the plaintiff applied to Lord Ellenborough, C. J., at nisi prius, for leave to amend his declaration, by omitting the profert of the bond on which the action was brought, his lordship refused it, because it was matter of material allegation. *Paine v. Bustin*, 1 Stark. 74.

Upon trial by the record.] Where in debt on judgment, *null tiel* record is pleaded, and motion is made for judgment, if upon the production of the record there appears to be a variance between it and the statement of it in the pleading, the court even then will amend it, on payment of costs; *Rastall v. Stratton*, 1 H. Bl. 49; *Blackmore v. Flemyng*, 7 T. R. 447, n. See *Engleheart v. Eyre*, 5 B. & Ad. 68; but it is not within either of the statutes, 9 G. 4, c. 15, or 3 and 4 W. 4, c. 42, s. 23, hereinafter mentioned. *Davis v. Dunn*, 11 Law J., 16, *qb.*, 1 Dowl. N. C. 317. But where in debt on a recognizance of bail, the declaration stated it to have been given in an action of debt, and on production of the record, upon *null tiel* record pleaded, it appeared to have been in an action of assumpsit, the court refused to allow the amendment then, saying that it ought to be made the subject of a distinct application; but they granted it afterwards. *Munkenbeck v. Bushnell*, 4 Dowl. 139.

By statute.] By stat. 9 G. 4, c. 15, every court of record, or any judge sitting at *nisi prius*, may, if they think fit, "cause the record, on which any trial may be pending before any such judge or court, in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print, produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party, as such judge or court shall think reasonable; and thereupon the trial shall proceed, as if no such variance had appeared; and in case such trial shall be had at *nisi prius*, the order for the amendment shall be indorsed on the postea, and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued shall be amended accordingly."

Where, in an action on a bill of exchange, the record stated it to have been drawn by A. B. payable to his own order, and by him indorsed to C. D.; and upon production of the bill at the trial, it appeared to be drawn payable to C. D.; the judge, on application, ordered the record to be amended; and the

court afterwards held that he had done rightly, but at the same time expressed a doubt whether they had any jurisdiction to interfere with the discretion of the judge in this respect. *Parks v. Edge*, 1 *Crompt. & M.* 429. See *Pullen v. Seymour*, 5 *Dowl.* 164. So where a declaration in assumpsit set out the contract in substance, but did not state it to be in writing, and the contract, (which was in writing), upon being produced at the trial, appeared to vary from the statement of it on the record, the judge ordered the record to be amended, but gave the defendant leave to move to enter a nonsuit, if the court should be of opinion that he had no power to amend; upon such motion being afterwards made, the court held it to be a case within the above statute, and that the amendment had been properly made. *Lamey v. Bishop*, 1 *Nev. & M.* 332, and see *Masterman v. Judson*, 8 *Bing.* 224. *S. P.*

By stat. 3 & 4 *W. 4*, c. 42, s. 23, if upon a trial before any court of record or judge at nisi prius, in any civil action, or in an information in the nature of a *quo warranto* or proceedings on a mandamus, "any variance shall appear between the proof and the recital or setting forth on the record, writ or document on which the trial is proceeding, of any contract, custom, prescription, name or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence," such court or judge may order the record, &c. to be forthwith amended, on such terms as to payment of costs to the other party, or postponing the trial, or both, as they shall think reasonable; or if it appear that although the variance be in a matter not material, yet that the opposite party may have been thereby prejudiced in the conduct of his action, prosecution, or defence, the court or judge may order the amendment on payment of costs, and withdrawing the record or postponing the trial, as they shall think reasonable; if the trial proceed, the order for the amendment shall be indorsed on the postea or writ, &c. and returned therewith, or, if in full court, on the roll; provided that any party, dissatisfied with the decision of a judge at nisi prius, sheriff or other officer, respecting his allowance of any such amendment, may apply to the court, out of which the record or writ issued, for a new trial. Where it was questioned whether a trial before the sheriff upon a writ of trial was within this statute, Bayley, B. said it was clearly within the reason of the act, if not within the words, and he thought the sheriff had power to order an amendment under it. *Hill v. Salter*, 2 *Dowl.* 380.

To warrant an amendment within this latter statute, it must be for some variance. And therefore, where the demise

in a declaration in ejectment was laid on the 31st October, without mention of any year, the court held that the omission was not amendable under this statute, for it was not a variance; they afterwards held, however, that the omission was not material. *Doe v. Heather*, 1 *Dowl. N. C.* 64, 10 *Law J.* 296, *ex. So*, it has been holden that a judge had no authority, under the statute, to amend a declaration which set forth an actual demise, by inserting terms which imported merely an agreement for a lease; nor to alter the breach which stated an eviction, into a breach that the defendant had not good right or title to grant the lease:—the effect of such amendments being, to introduce a new contract and breach, and to render a remodelling of all the pleas upon the record necessary. *Brashier v. Jackson*, 6 *Mees. & W.* 549. Nor can he amend the award of the venire. *Adams v. Power*, 7 *Car. & P.* 76. But he may amend a declaration in ejectment, by altering the date of the demise in it; *Doe v. Leach*, 3 *Man. & Gr.* 239, 9 *Dowl.* 877; or in trespass, by altering the name of the close; *Howell v. Thomas et al.*, 7 *Car. & P.* 342; or in a case for negligence, by altering the declaration against the defendant as a carrier, into a declaration against him as a wharfinger; *Parry v. Fairhurst*, 2 *Cr. M. & R.* 190; or in case for misrepresentation, by altering the representation alleged; *Mash v. Densham*, 1 *M. & Rob.* 442; or in case for verbal slander, by altering a direct charge, "Smith has got himself into trouble," &c. into a statement that he the defendant had heard so; *Smith v. Knowelden*, 9 *Dowl.* 402, 10 *Law J.* 126, *cp.*; or where the words were spoken in Welsh, but were set out in English only, by also inserting the Welsh words; *Jenkins v. Phillips*, 9 *Car. & P.* 766; or in assumpsit for not doing certain work, by altering the description of the work, and the sum to be paid for it, where the defendant could not be prejudiced by the alteration, *Ward v. Pearson*, 5 *Mees. & W.* 16, or by altering the implied promise alleged, *Whitwell v. Scheer*, 8 *Ad. & El.* 301, or by altering the express promise alleged; *Gurford v. Bailey*, 11 *Law J.* 105, *cp.*, 1 *Dowl. N. C.* 519; in an action on a special agreement, by inserting a stipulation in the agreement which had been omitted; *Clark v. Morrell et al.*, 9 *Dowl.* 461; in an action on a guarantie, by altering the statement of it in the declaration; *Smith v. Brandram*, 2 *Man. & Gr.* 244; in an action for goods furnished to a third person, where one count of the declaration was upon a promise to pay, and another on a promise to be accountable for and pay, the amount, and the evidence was of a guarantie; Lord Denman having allowed this to be amended at the trial, the court held that he had done rightly, Parke, J. saying that the act extended to all such cases, where the defendant had not been misled by the misdescription; *Hanbury v. Ella*, 3 *Nov. & M.* 438; in an

action for not delivering potatoes sold and to be delivered by the defendant and paid for on delivery, by altering it to a sale of the potatoes to be dug by the plaintiff and then paid for; *Stansbury v. Matthews*, 4 M. & W. 343; in an action on a wager, by striking out a part of the wager alleged; *Evans v. Fryer*, 10 Ad. & El. 609; in an action on an agreement, as made between A. & B., by altering it to an agreement between A. & B. and two others his trustees; *Boys v. Ancell*, 5 Bing. N. C. 390; in an action on a bill of exchange, by altering the statement of it as to the amount, *Sanderson et al. v. Piper et al.*, 7 Dowl. 632, or in the date, and the time it had to run, *Beckett et al. v. Dutton*, 10 Law J., 1, *ex.*, or in the name of the payee, the declaration stating it to be payable to the defendant, when it was in fact payable to the drawer's order, and by him indorsed to the defendant, who indorsed it over; *Parke v. Edge*, 1 Cr. & M. 429; in debt on bond, by altering the amount of the penalty; *Hill v. Salter*, 2 Cr. & M. 420; in an action on a submission to arbitration, by altering the agreement of submission as set out, as to costs. *Duckworth v. Harrison*, 5 Mees. & W. 427. In a plea, also, in an action for use and occupation of a house, where the defence pleaded was that the defendant was a lunatic, and the house was unnecessary for her, as she occupied another house in A. street, but the evidence was, not that she occupied a house, but that she resided with her mother in A. street, it was allowed to be amended accordingly. *Dane v. Kirkwall*, 8 Car. & P. 679. If the amendment of a declaration at the trial, under this statute, have the effect of making it bad in substance, and the defect be not cured by verdict, the plaintiff may move in arrest of judgment. See *Palmer v. Sparshot*, 11 Law J., 204, *cp.*

The amendment, also, to be warranted by this statute, must be in some particular not material to the merits of the case. *ante*, p. 129. If for instance it appear that the variance may probably have prevented the defendant from pleading a good bar to the action, the judge will not allow of the amendment. *Joy v. Young*, 1 M. & Rob. 545. But it is for the judge at the trial to say whether it is material or not, and to refuse or allow of the amendment accordingly; the court above will not interfere with his judgment in this respect. *Per Tindal, C. J., in Doe v. Leach*, 10 Law J., 291, *cp.*, see *Stansbury v. Matthews*, 7 Dowl. 23. If the opposite party cannot have been prejudiced in the conduct of his action or defence by the amendment, it is in the discretion of the judge whether he will grant him costs, or postpone the trial, or not; but if he appear to be prejudiced by it, then the amendment must be upon payment of costs, and withdrawing the record or postponing the trial, as the judge may think reasonable. See the *Act, ante*, p. 129. *Smith v. Brandram*, 2 M. & Gr. 244, 9 Dowl. 430.

The amendment must be made before verdict; it cannot be made afterwards without consent. *Brashier v. Jackson*, 6 *Mees. & W.* 549. And if the trial proceed, the order for it shall be indorsed on the postea or writ, &c. and returned therewith.

Or, by the same statute, 3 & 4 W. 3, c. 42, s. 24, in all such cases of variance, the court or judge, instead of ordering the record to be amended, may direct the jury to find the facts according to the evidence, and such finding thereupon shall be indorsed upon the record, &c.; and notwithstanding the finding on the issue joined, "the said court, or the court out of which the record has issued, shall, if they think the said variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case." Where, in an action against a sheriff for an escape, the evidence was, not of an escape, but of a negligent omission by the sheriff's officer to make the arrest when he had it in his power to do so: *Alderson, B.*, not thinking it a case in which he ought to amend, desired the jury to find the facts specially, if they thought the negligence proved, and the jury accordingly gave a special verdict for the plaintiff, although they found the issue for the defendant; and afterwards, upon a motion that judgment should be entered for the plaintiff, the court, being of opinion that the defendant experienced no inconvenience from the course pursued by the plaintiff, and was not prejudiced in the conduct of his defence, made the rule absolute. *Guest v. Elwes*, 2 *Har. & W.* 34, *S. C. nom. Guest v. Elwes*, 5 *Ad. & El.* 118. And this has been done even in a case where the plaintiff, before the trial, gave notice that he relied on the variance. *Gayler v. Farrant*, 4 *Bing. N. C.* 286. But where in an action for diverting a water-course, the plaintiff in his declaration entitled himself to the water as owner of a mill, but the evidence was that he was entitled to it as owner of the land on which the mill had within twenty years been built: *Alderson, B.*, at the trial, refused to amend for this variance, but by his direction the jury found the facts specially, and they were indorsed on the postea, for the opinion of the court as above directed; the court, however, refused to grant the plaintiff any rule for judgment on this special finding. *Frankum v. Earl of Falmouth*, 4 *Nev. & M.* 330, and see *Knigh v. McDowell et al.*, 12 *Ad. & El.* 438.

Amendment at other times.

After plea in abatement.] After a plea in abatement for misnomer, the court allowed the plaintiff to amend the declaration, in the defendant's name, even although the defendant was a prisoner, and would have been supersedeable if the

plaintiff were obliged to commence a fresh action. *Owens v. Dubois*, 7 T. R. 698. And the court have made the like order in a penal action for usury, even although the time for bringing a fresh action expired, where there appeared to have been no unnecessary delay on the part of the plaintiff. *Mestaer v. Tertiz*, 3 M. & S. 450. So in an action by executors, where the defendant pleaded in abatement the nonjoinder of a co-executrix, the court allowed the writ and declaration to be amended, by adding the name of the co-executrix as plaintiff, he being merely a nominal party (not having proved the will), and as a fresh action would be barred by the statute of limitations. *Lakin v. Watson*, 2 Dowl. 633.

After demurrer.] Where a pleading is demurred to, the court, even after the demurrer has been argued, will give the party leave to amend, if it be necessary to the justice of the case. And even where judgment had been given upon a demurrer to a plea, and the defendant afterwards obtained a judge's order to amend: upon a rule to set aside this order, although the court admitted that the application should have been made to them and not to a judge, and should have been made at the time of arguing the demurrer, yet as it appeared upon affidavit that the matter of the amendment had not come to the defendant's knowledge until after the demurrer had been argued, the court discharged the rule upon payment of costs by the defendant. *Atkinson v. Baynton*, 1 Hod. 44. But this leave to amend after demurrer, must be considered a matter entirely in the discretion of the court. See *Vant v. Reece*, 7 Moore, 244. And in an action against executors, in their own right, on a covenant for good title and quiet enjoyment, the court refused to assist the plaintiff by allowing him to amend his declaration, after argument on special demurrer; *Noble v. King*, 1 H. Bl. 34; and the like in an action against the sheriff. *Cooke v. Birt*, 6 Taunt. 765. And it seems that where a party has once amended on demurrer, if the same pleading be again demurred to, the court will not give him leave to amend a second time. *Kinder v. Paris*, 1 H. Bl. 561. On the other hand, if a party demur, and judgment be given against him, the court will seldom allow him to withdraw his demurrer, and plead, &c.; at least not without an affidavit of merits. *Bramah v. Roberts*, 1 Bing. 7. C. 481.

After error.] The court will amend a declaration, *Moody v. Tracey* 4 Taunt. 588, or judgment, *Dunbar v. Hitchcock*, 3 M. & S. 591, after error brought and errors assigned; we have already noticed several cases in which this has been done. See *ante*, p. 124. In one case, the court of Common Pleas amended the postea, even after argument in error, *Richardson v. Mellish*, 3 Bing. 334, and then amended the

judgment roll, to make it conformable with the *postea*, after the judgment in error was actually entered of record. *Id.* 346. & 7 B. & C. 819. And where there was a plea of tender, but the sum tendered was found to be insufficient, and the plaintiff entered up his verdict for the whole of his debt, instead of for the excess of it beyond the sum tendered, and a writ of error was brought on this account: the court allowed him to amend his *postea*, on payment of the costs in error and of the application. *Wallis et al. v. Goddard*, 2 M. & Gr. 912. So, where the *distringas juratores* by mistake was made returnable in vacation, instead of on the first day of the following term, and was tested on the day on which it ought to be returnable, and a writ of error *coram vobis* was brought on this account: the court allowed the *distringas* to be amended, on payment of the costs of the writ of error and of the application. *Chess v. Deales*, 12 Law J., 14 *ex.* So where the writ of error was brought against good faith, the court amended the defects which were the subject of the writ of error. *Ouchterlony v. Gibson*, 2 Dowl. N. C. 101.

After new trial granted.] The court will give leave to amend, after a new trial has been granted, particularly where the party failed at the first trial, in consequence of the defects sought to be amended. This, however, if allowed, is usually made part of the rule for the new trial. But the court, in such a case will not grant an amendment which has no reference to the merits, but is merely sought for in order to give the party an advantage at the second trial, to which he would not otherwise be entitled. And therefore, after a new trial granted, they refused to allow the defendant to strike out the general issue, and substitute a plea of the plaintiff's bankruptcy, which the defendant sought to do for the purpose of his having the right to begin and of the general reply at the second trial. *Chambers v. Bernasconi*, 1 Cromp. & J. 459, and see *Parker v. Ansell*, 2 W. Bl. 920.

After nonsuit.] Where a party is nonsuit, for a defect in his pleading, which the court, if applied to, would have amended before trial, the court, if they set aside the nonsuit and grant a new trial, will at the same time give him leave to amend. Formerly this was frequently done, where a plaintiff was nonsuit for variance. *Halkead v. Abrahams*, 3 Taunt. 81. *Williams v. Pratt*, 5 B. & A. 896; but see *Brown v. Knill*, 5 Moore, 164, *cont.* But it is doubtful how far the court would do so now, particularly in cases of variance within stat. 9 G. 4, c. 15, and 3 & 4 W. 4, c. 42, already mentioned, *ante*, p. 128, 129, but see *Pullen v. Seymour*, 5 Dowl. 164, unless perhaps in cases where the action would otherwise be barred by the statute of limitations. *Dartnall v. Howard*, 2 Chit. 28.

SECTION II.

Writ of Error.

In what cases.] A writ of error lies upon the final judgments of all courts of record, acting according to the course of the common law; upon the judgment of courts not of record, a writ of false judgment lies, and not a writ of error; and judgments of courts, proceeding in a summary way, or not according to the course of the common law, are brought before a superior court to be rectified, not by writ of error, but by *certiorari*. 2 *Saund.* 101, a. See *Scott v. Bye*, 2 *Bing.* 344. A writ of error lies upon a judgment of nonsuit, *Bar v. Bennett*, 1 *H. Bl.* 432, but not upon an interlocutory judgment, *Samuel v. Judin*, 6 *East*, 233, or even upon a judgment of *respondeas ouster* on a plea to the jurisdiction, &c. *Hodgson v. Milles*, 2 *Tidd*, 1195. And it is not until judgment has been given upon the whole record, that a writ of error can be brought; and therefore where there is final judgment as to some issues in law, but other issues in fact still remain to be tried, a writ of error will not lie on the judgment already given, without striking out the issues in fact, and which can only be done by consent. *Beckham v. Knight et al.*, 7 *Dowl.* 409. *Carden v. General Cemetery Company*, *Id.* 425. Where a writ of error lies in civil actions, it is in all cases grantable *ex debito justitiæ*, 2 *Saund.* 101, a. *Bleasdale v. Darby*, 9 *Price*, 606, and not merely *ex gratia*.

Within what time.] A writ of error may be brought upon a judgment, at any time within twenty years after such judgment has been signed or entered of record. 10 & 11 *W.* 3, c. 14. If brought even after that time, the court will not quash it, but will leave the party to plead the statute. *Higgs v. Evans*, 2 *Str.* 837.

By and against whom.] The person by or against whom a writ of error is brought, must be party or privy to the record; but if a feme covert be sued as a feme sole, and judgment given against her, she and her husband may join in bringing the writ of error; 2 *Saund.* 101, c.; and the husband must be joined, if she assign her coverture for error. *M'Namara v. Fieker*, 8 *T. R.* 302. It is usually brought by the party against whom the judgment is given; but it may be brought by a plaintiff to reverse his own judgment. *Johnson v. Jebb*, 3 *Burr.* 1772. And where there is a joint judgment against several, the writ must be brought in the names of all; but if in trespass against two, there be judgment for one and against the other, the defendant against whom the judgment is, may have a writ of error in his own name alone. 2 *Saund.* 101, e, f.

Also if, in an action where there are two counts, judgment be given for the defendant upon one, and for the plaintiff upon the other, the defendant may bring a writ of error upon the latter judgment: and the court of error cannot examine into the legality of the first count, no error being assigned upon that part of the record. *Campbell v. French*, 6 T. R. 200.

To what court.] The writ is always directed of course to the court which has given the judgment alleged to be erroneous, and is made returnable in the court of error. "Writs of error upon any judgment given by any of the superior courts of law, at Westminster, shall hereafter be made returnable only before the judges, or judges and barons, as the case may be, of the other two courts, in the Exchequer chamber." 11 G. 4, and 1 W. 4, c. 70, s. 8. A writ of error upon a judgment of the Exchequer chamber must be returnable in parliament. *Id.* A writ of error upon a judgment of the courts of the counties palatine of Lancaster and Durham, and of the other inferior courts of record throughout the kingdom, (except the courts of London, of the Stannaries, and of the Cinque ports) is made returnable in the court of Queen's bench; 2 *Saund.* 101, a. b.; and upon the judgment of the court of Queen's bench in such a case, a writ of error lies to the Exchequer chamber. *Nesbit v. Rishton*, 9 Ad. & El. 426.

The writ, and how sued out and allowed.] A writ of error is an original writ, issuing out of Chancery, and may be had at the cursitor's office, upon leaving a præcipe there for it. The præcipe is written on plain paper, and may be in this or the like form: "*Surrey, to wit: Writ of error for Joseph Styles, late of —, maltster, at the suit of John Nokes, on a judgment in trespass*" [or as the cause of action may be] "*in the Queen's Bench, returnable on the — day of —. C. D. defendant's attorney, 2 March, 1843.*" As soon as you get the writ from the cursitor, take it to the proper clerk in the master's office, who will allow it, and give you a note of allowance. And the writ must be allowed; the court have no discretion in the matter; nor can they afterwards set aside the allowance, even although it appear to be a case in which a writ of error will not lie. *Boreman v. Brown*, 1 Dowl. N. C. 281. Make a copy of this note of allowance, and at the foot of it you must state some particular ground of error, intended to be argued, otherwise the writ of error will be no *supersedeas* of execution; R. G. H. 4 W. 4, r. 1, s. 9, *infra*; and which statement may be thus; "*Take notice that one of the grounds of error intended to be argued in this case, is, that,*" &c. stating the point shortly. Serve this copy upon the opposite attorney, at the same time showing him the original. Care must be taken that the form of action be correctly described in the writ,

see *Sampayo v. De Payba*, 5 Taunt. 82, and note of allowance. See *Hills v. Spilsbury*, 1 Dowl. 421. *Green v. Okill*, *Id.* 422. It may be necessary to mention that there is no objection to suing out a writ of error by a different attorney from the one previously engaged in the action. *Batchelor v. Ellis*, 7 T. R. 337.

The writ may bear teste before the judgment is signed; 2 Saund. 101, g.; and if it be at all likely that the opposite party will sue out execution immediately after he signs judgment, it will be prudent to sue out the writ of error thus before judgment, so as to be prepared to serve the copy of the note of allowance, immediately after the taxation of costs. And if judgment be signed at any time before the writ is returnable, the writ will operate as a supersedeas of execution. Formerly, if the judgment were signed in or of the term in which the writ was returnable, the writ would be deemed to apply to it, and would be a supersedeas of execution; *Payne v. Whaley*, 2 B. & P. 137. *Somerville v. White*, 5 East, 145. *Hill v. Tebb*, 1 New Rep. 298. *Emanuel v. Martin*, 2 M. & S. 334; but as the reason of these decisions was, that the judgment, having relation to the first day of the term, was in law prior to the return day of the writ of error, and as judgments now have no such relation, but relate to, and take effect from, the day only on which they are actually signed, it may fairly be doubted whether the court would now go so far as to support a writ of error returnable before the judgment is actually signed. But if the opposite party were to delay signing his judgment, until after the writ of error was returnable, for the purpose of evading the writ, and were then to sign judgment and sue out execution, the court upon application would set aside the execution. *Jaques v. Nixon*, 1 T. R. 280. *Curd v. Eastend*, *Barnes*, 260. On the other hand, it may be sued out at any time within twenty years after the judgment, the time of limitation mentioned, *ante*, p. 135; but then it cannot of course be a stay of supersedeas of execution, unless it be sued out and allowed before execution executed. *Perkins v. Woolaston*, 1 Salk, 321. *Stonehouse v. Ramsden*, 1 B. & A. 676. *Gravall v. Stimpson*, 1 B. & P. 478. *Belshaw v. Marshall*, 1 Nev. & M. 689, and see 2 Saund. 101, d. It is not necessary that it should have fifteen days between the teste and return. *Laidler v. Foster*, 4 B. & C. 116. In what cases it may be amended, see *ante*, p. 119.

In what cases it abates, or may be quashed.] If a sole plaintiff in error die before errors assigned, the writ of error abates; 2 Saund. 101, n.; if one of two plaintiffs die, it does not, but the death being suggested on the roll, the defendant may proceed to have his judgment affirmed. *Clarke v. Rippon*,

1 B. & A. 586. But after errors assigned, the death of a plaintiff in error does not abate the writ. 2 *Saund.* 101, a. Nor does the writ abate by the death of defendant in error, whether it happen before or after errors assigned. *Id.* So the marriage of a feme plaintiff in error, abates the writ; *Buller v. Pinna*, 2 *Str.* 880. *Jenkins v. Bates*, *Id.* 1015; but the marriage of a feme defendant does not. A writ of error abates by the death of the chief justice or chief baron, before he signs the return to it; but execution in that case cannot be sued out without the leave of the court. 2 *Saund.* 101, a. A writ of error in parliament, does not abate by a prorogation, or even by a dissolution. *Com. Dig. Parliament*, p. 2.

Also a defendant may move to quash the writ, for some defect which cannot be amended. And the court of Exchequer chamber have quashed a writ of error, which was sued out upon a judgment in a feigned issue, upon the ground that a writ of error did not lie in such a case. *Snook v. Mattock*, 5 *Ad. & El.* 239. This motion must be made, either in the court of Chancery, from which the writ issued, or in the court in which the writ is returnable; *Foster v. Laidler*, 6 *D. & R.* 174, 4 *B. & C.* 116; but not in the court to which it is directed. *Lloyd v. Skutt*, 1 *Doug.* 350. Upon quashing a writ of error, for variance from the original record or other defect, the defendant in error is entitled to costs, in the same manner as he would have been if judgment had been affirmed, and recoverable in the same manner. 4 *Ann.* c. 16, s. 25.

How far a supersedeas of execution.] The allowance and service of a writ of error operates as a supersedeas of execution, *Stonehouse v. Ramsden*, 1 *B. & A.* 676. *Marston v. Halls*, 5 *T. R.* 292, and, in the case of a prisoner, prevents the plaintiff from charging him in execution; *Marston v. Halls*, 2 *Mees. & W.* 60; provided bail (when necessary) be duly put in and perfected. *Lane v. Bacchus*, 2 *T. R.* 44. *Smith v. Howard*, 2 *D. & R.* 85. See *Sparrow v. Sir W. Lewis*, 8 *Taunt.* 126. Even although the writ be such as might be quashed by the court above, still until it is quashed, it is a stay of execution. *Lloyd v. Skutt*, 1 *Doug.* 339, 353. And so entirely is it a supersedeas, that if a *ca. sa.* be sued out for the purpose of fixing bail, and a writ of error allowed and served before the *ca. sa.* is returnable, the *ca. sa.* cannot be returned, nor can the plaintiff proceed further against the bail. *Perry v. Campbell*, 3 *T. R.* 390. *Miller v. Neubald*, 1 *East*, 662. *Dudley v. Stokes*, 2 *W. Bl.* 1183. And the writ formerly operated as a supersedeas of execution, from the time of its allowance, although the note of allowance were not served; the service of the note of allowance being deemed necessary only to bring the opposite attorney into contempt if he proceed to execution after it. 2 *Saund.* 101, g, h. *Hawkins v. Jones*, 5 *Taunt.* 204.

Nixon, 1 T. R. 279. *Hanott v. Farettes, Barnes, mith v. Cave*, 3 Lev. 312. But now by R. G. H. 4 W. 1. 9, "no writ of error shall be a supersedeas of execution service of the notice of the allowance, containing a writ of some particular ground of error intended to be provided that if the error stated in such notice shall be frivolous, the court, or a judge upon summons, or execution to issue." See *Robinson v. Day*, 2 Dowl. 796, 1 Gale, 91. But this does not extend to writs of error *coram nobis* for errors in *Evry v. Price*, 2 Mees. & W. 533. If after the allowance of a writ of error, the plaintiff, by suing out execution, bring an action on the judgment, the court will not permit him to sue out execution on the judgment, until the writ of error has been determined for that would be doing indirectly, what the court would permit him to do directly. *Bennell v. Black*, 3 T. 2454, but see *Bishop v. Best*, 1. 275.

A writ of error, *coram nobis*, for error in fact, is so far a stay of execution, that execution cannot be sued out without leave of the court. *Ribitt v. Wheeler*, Say. 166, cit. 8 East, 415, *Levy v. Semple*, supra, or a judge. *Semple v. Turner*, 6 Mees. & W.

A writ of error become ineffectual, through the default of the plaintiff in error, and he bring a second, the second writ will be no supersedeas of execution. *Birch v. Triste*, 112.

A writ of error be sued out, contrary to an agreement between the parties, express, *Camden v. Edie*, 1 H. Bl. 21. *Nutt*, 1 T. R. 388. *Baddely v. Shafto*, 8 Taunt. 427, or implied, *Cave v. Gompertz*, 2 Cr. & M. 427, or implied, *Cave v. Brown v. Ld. Granville*, 2 Dowl. 796, 3 B. & C. 735. *Brown v. Ld. Granville*, 2 Dowl. 796, wise against good faith, *Cates v. West*, 2 T. R. 183, *Wies Company v. Harrison*, 12 Ad. & El. 642, the court may order it to be nonprossed, or will stay the proceedings, at all events, will not allow it to operate as a stay of execution, even although there really be error on the record. It may appear from any admission of the plaintiff in error or from other circumstances in the case, directly or indirectly, that the writ of error is brought merely for delay, but upon application will allow the defendant in error to execution, notwithstanding the writ of error, *Mitchell v. Poole v. Charnock*, 3 T. R. 79. *Kemp-Macaulay*, 4 T. R. 436. *Levett v. Perry*, 5 T. R. 669. *Grant v. Grant*, Id. 714. *Spooner v. Garland*, 2 M. & S. 476. *Eiche v. Sowerby*, 1 B. 1. *Doe d. Morgan v. Roe*, 3 Bing. 169, if such declaration were after the action commenced. *Redford v. Gar-*

rod, 7 Taunt. 537. *Baskett v. Barnard*, 4 M. & S. 331. And in error upon a nonsuit, the court will not allow it to be a stay of execution, *Keeling v. Austin*, 7 Bing. 601, at least not unless some real error be pointed out, *Evans v. Swete*, 2 Bing. 326, particularly if there be any delay in prosecuting the writ. *Dow v. Clarke*, 1 Cr. & M. 860. But the court will not infer that a writ of error in parliament has been brought for delay, merely from the fact of the plaintiff in error having previously brought a writ of error in the Exchequer chamber, and having allowed the judgment to be affirmed there without argument. *Harrison v. Grote*, 6 T. R. 400.

It has been already mentioned, that if a writ of error be allowed, and the note of allowance served, before a *ca. sa.* to fix bail is returnable, the *ca. sa.* cannot be returned, and the writ of error in that case operates as a stay of proceedings against the bail. But if the *ca. sa.* be returned before the service of the note of allowance, still the court upon application of the bail, will stay the proceedings against them pending error, in all cases where, supposing execution not to have been sued out, the writ of error would be a supersedeas of execution. But in such a case, the application must be made before the time for rendering the principal has expired. *R. G. H. 2 W. 4, s. 84.*

Bail.] By stat. 6 G. 4, c. 96, s. 1, after reciting a former statute on the subject (3 Jac. 1, c. 8,) it is enacted that upon any judgment to be given in any of the king's courts of record at Westminster, in any personal action, execution shall not be stayed or delayed by writ of error or supersedeas thereupon, without the special order of the court, or some judge thereof, unless a recognizance, with condition according to stat. 3 Jac. 1, c. 8, be first acknowledged in the same court. And the recognizance, according to the statute of James, was required to be in double the sum recovered by the judgment, conditioned to prosecute the writ of error with effect, and to satisfy and pay the debt, damages and costs awarded by the former judgment, and also the costs and damages to be awarded for the delaying of execution, if the said former judgment should be affirmed. Bail in error therefore cannot be relieved from their liability by a render of their principal, or by his bankruptcy and certificate, *Southcote v. Braithwaite*, 1 T. R. 624, or even by his being taken in execution for the debt, damages and costs in error. *Perkins v. Pettit*, 2 B. & P. 440. Where bail in error were put in in July, were excepted to in August, and notice of justification was then given for the first day of Michaelmas term, but a few days before that time the plaintiff in error nonprossed his own writ: it was argued that as the bail were excepted to, they became as no bail, and were therefore not liable; but the court held that as they had suspended

the execution from July to November, they were liable to be sued upon their recognizance. *Dickenson v. Heseltine*, 2 M. & S. 210. See *Jones v. Tubb*, 1 Wils. 337. *Gould v. Holmstrom*, 7 East, 580. So where notice of justification was in like manner given, but the bail did not justify, the court held that they were not entitled to have an *exoneretur* entered on the bail piece. *Adnam v. Wilks*, 6 B. & C. 237. The recognizance must be taken "in double the sum recovered, except in case of a penalty: and in case of a penalty, in double the sum really due, and double the cost." R. G. H. 2 W. 4, s. 26, and see *Reid v. Cooper*, 5 Taunt. 320. *Moore v. Lynch*, 1 Wils. 213. *Dixon v. Dixon*, 2 B. & P. 443.

It may be necessary to remark, that the stat. 6 G. 4, c. 96, s. 1, above mentioned, extends only to writs of error brought by defendants; if the plaintiff in an action bring error, bail is not required. See *Freeman v. Garden*, 1 D. & R. 184. It does not also extend to error in fact, *coram nobis*; *Levy v. Price*, 2 Mees. & W. 533; but the court in such a case may require it, as a condition of their allowing the writ of error to be a stay of execution. See *Birch v. Triste*, 8 East, 412. And where it is required to sue it out without putting in bail, a rule *nisi* for that purpose must be obtained. *Gibbs v. Trevelion*, 8 Dowd. 140.

In ejectment also, bail is required, after verdict for the plaintiff; 16 & 17 C. 2, c. 8, s. 3; and the recognizance shall be taken in "double the yearly value, and double the costs." R. G. H. 2 W. 4, s. 27. It is not necessary that the defendant should join in the recognizance. *Keene v. Deardon*, 8 East, 298. And this recognizance must be given, although the defendant may have already put in and justified bail under stat. 1 G. 4, c. 87. *Doe v. Moore*, 7 Bing. 124. See *post tit. "Ejectment"*; but in that case, putting in and perfecting bail in error, will have the effect of discharging the bail below. 1 G. 4, c. 87, s. 3.

Bail must be put in within four days after the allowance of the writ of error. R. E. 16, c. 2, and E. 36. C. 2, K. B.; 2 M. 28 C. 2, C. P. *Gravall v. Stimpson*, 1 B. & P. 478. But where the writ is allowed before judgment in the original action, the plaintiff in error in that case is allowed four days after the judgment, to put in bail. 2 Saund. 101, h. *Bennett v. Nichols*, 4 T. R. 121. *Jaques v. Nixon*, 1 T. R. 279, and see *Blackburn v. Kymer*, 5 Taunt. 672. The court will seldom grant a further time to put in or justify the bail, *Handasyde v. Morgan*, 2 Wils. 144, unless where the bail are prevented from attempting to justify, by some misconduct of the opposite party, *Dyott v. Dunn*, 1 D. & R. 9, but see *Anon.* 1 Dowd. 32, or the like. See *Roger's bail*, 2 Dowd. 197. And notice of the bail must be given within the time here mentioned; as the bail are not deemed to be put in, until such notice is given.

The bail to the action may be bail in error. *Martin v. Justice*, 8 T. R. 639. So, there is no objection to members of a corporation being bail in error for the corporation, in an action against it. *Henley v. the Mayor of Lyme Regis*, 6 Bing. 155. But mere hired bail, if put in, may be treated as a nullity, and the defendant may sign judgment. *Brown v. Brown*, 4 Bing. 38. *Fuller v. Coombe*, 1 Dougl. 207. *Sutcliffe v. Eldred*, 3 Dougl. 184. *Ward v. Levi*, 1 B. & C. 268.

Bail in error are always, in practice, put in in town: it is doubtful whether they can be put in before a commissioner in the country; at all events the court will not make an order allowing them to be so taken. *Williams v. Pantton*, 8 Dougl. 701.

The mode of excepting to bail in error, is, by obtaining a rule for better bail at the master's office, and serving a copy upon the attorney of the plaintiff in error; and he must then justify his bail, (which is done as in ordinary cases, see *ante*, vol. 1, p. 186, &c.) within four days, if the rule be served so many days before the end of the term. *R. M. 6 G. 2, C. P.* But if the rule for better bail be served in the vacation, and it be accompanied by a notice requiring the bail to justify before a judge, in that case "the bail shall justify within four days from the time of such notice; otherwise on the first day of the ensuing term." *R. G. H. 2 W. 4, s. 17.*

As to the mode of proceeding against bail in error on their recognizance, see 2 *Saund.* 72, c, d.

Certifying the record.] By R. G. H. 4, W. 4, r. 1, s. 10, "no rule to certify or transcribe the record shall be necessary: but the plaintiff in error shall, within twenty days after the allowance of the writ of error, get the transcript prepared and examined with the clerk of the errors of the court in which the judgment is given, and pay the transcript money to him; in default whereof the defendant in error, his executors or administrators, shall be at liberty to sign judgment of nonpros. The clerk of the errors shall, after payment of the transcript money, deliver the writ of error, when returnable, with the transcript annexed, to the clerk of the errors of the court of error." The time here mentioned, however, may be extended by a judge's order. *Id.* s. 13. Or if the time here mentioned do not expire before the 10th August, the plaintiff in error shall have twenty days after the 24th October, to comply with the rule. *Id.* Where in error from the court of King's Bench, the plaintiff in error, not having had the transcript prepared within the time thus limited, an application was made to the officer to sign judgment of nonpros, but he refused, alleging that the plaintiff should have notice; in the mean time, the plaintiff in error hearing of the application, the transcript was prepared and certified: the

nt in error then applied to the court of King's Bench
e judgment of nonpros signed *nunc pro tunc*; but
ge, J. held that as the transcript had in fact been re-
the cause was in the court above, and he could not
e. *Pitt v. Williams*, 1 Har. & W. 363, 4 Dougl. 70.
the defendant in error, instead of signing judgment of
, sued out execution upon the original judgment, the
error being returnable, and no transcript removed:
urt of Exchequer held that he had a right to do so.
Clark, 2 Dougl. 302. It may be necessary to mention,
lefendant in error cannot transcribe. *Anon.* 1 Wils. 35.
at. 11 G. 4, and 1 Will. 4, c. 70, s. 8, "a transcript of
rd only, shall be annexed to the return of the writ."
cases it may be amended, see *ante*, p. 119, and *Salter*
; 3 Nev. & M. 717.

plaintiff in error, it seems, may nonpros his writ of
without carrying over the transcript; *Milborn v. Cope-*
M. & S. 104; and upon a nonpros before the record
cribed, the defendant in error is not entitled to costs.
Richards, 7 East, 111. But where the plaintiff in
plied to the court of Exchequer for leave to nonpros
before transcript, the court said that if he had the
nonpros, he might exercise it at his peril; but if he
for leave to do so, he could only have it upon payment
i. *Wilkinson v. Malin*, 1 Cr. & M. 240.

[*assigning errors*, &c.] After the transcript is certified to
urt of error, the next step is for the plaintiff in error
gn errors. Formerly he might be compelled to do so,
e cases by a rule to allege diminution and rule to assign
and in others by a *scire facias quare executionem non*;
w, by R. H. 4 W. 4, r. 1, s. 11, "no rule to allege dimi-
nor rule to assign errors, nor *scire facias quare execu-*
non shall be necessary, in order to compel an assign-
f errors; but within eight days after the writ of error,
ie transcript annexed, shall have been delivered to the
officer, or within twenty days after the allowance of
it in cases of error *coram nobis* or *coram vobis*, the
ff in error shall assign errors; and in failure to assign
the defendant in error, his executors or administrators,
e entitled to sign judgment of nonpros. The time
entioned may be extended by a judge's order. *Id.* s. 13.
the time do not expire before the 10th August, the
ff in error shall have the same time after the 24th
x, to comply with this rule. *Id.* s. 13.

the assignment drawn by counsel or a pleader; if gene-
need not be signed by counsel; if special, it must.
is it on plain paper, and deliver it to the defendant's at-
It must in all cases be delivered to the defendant's

errors shall be necessary, unless in case of a cn parties; but the plaintiff in error may demand a jo error, or plea to the assignment of errors; and the de in error, his executors or administrators, shall be within twenty days after such demand, to deliver a jo plea, or to demur, otherwise the judgment shall be re This time, however, may be extended by a judge's ord Or if the time here mentioned shall not expire bet 10th of August, the plaintiff in error shall have the sa after the 24th of October, to comply with the rule. 1

If a plea or demurrer be necessary (*see 2 Saund. 101, get it drawn by counsel or a pleader, and signed by cou the common joinder be sufficient, you may draw it yours the form in the Appendix; it is not necessary it should b by counsel, even although it be a joinder to a special ass of errors. Grant v. Smith, 5 Dowl. 107. Engross it o paper, and deliver it to the plaintiff's attorney. R. G. 4, r. 1, s. 12.*

No entry on the roll is now necessary, until after ju R. G. H, 4 W. 4, r. 1, s. 13. *See post.*

Formerly it was generally understood that in error could not be compelled to take more than one step in in a term; but the court of Exchequer chamber have otherwise. *Home v. Bentick, 1 Brod. & B. 514.*

Argument, &c.] By R. G. H. 4 W. 4, r. 1, s. 14, issue in law is joined, either party may set down the c argument with the proper officer, and forthwith give n writing thereof to the other party, and proceed to arg in like manner as on a demurrer, without any rule or for a condition. *See ante, vol. 1, p. 201.*

books as ought to have been delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the errors or clerk of the rules in the King's Bench, as the case may be, a sufficient sum to pay for such copies." See *Best v. Prior*, 2 Dowl. 189; and see the cases decided on a similar rule as to demurrers, ante, vol. 1, p. 322. And this rule has been holden to extend to writs of false judgment. *Dempster et al. v. Purnell*, 1 Dowl. N. C. 168, 11 Law J., 33, cp.

Afterwards when the case is called on, the plaintiff's counsel is heard first, then the counsel for the defendant, and lastly the counsel for the plaintiff in reply. One counsel only is heard on each side; and if briefs be given to two, the junior usually argues the case, and the senior takes notes, unless the senior's brief be marked "to argue." After the argument, the judges deliver their opinion.

Interest.] By stat. 3 & 4 W. 4, c. 42, s. 30, "if any person shall sue out any writ of error, upon any judgment whatsoever, given in any court, in any action personal, and the court of error shall give judgment for the defendant thereon, then interest [usually at the rate of 4 per cent. See *Langridge v. Levy*, 7 Dowl. 27,] shall be allowed by the court of error, for such time as execution has been delayed by such writ of error, for the delaying thereof."

Counsel will move for interest accordingly, as soon as the court have delivered their opinion; although I believe it is usual for the master to add it, upon taxation, whether it be moved for or not. See *Burn v. Carvalho*, 4 Nev. & M. 893.

Costs.] If judgment in an action be given against a defendant, and before execution he bring error, if the judgment be affirmed, or the writ of error nonprossed, the defendant in error shall be entitled to his costs. 3 H. 7, c. 10. Or if in such a case the judgment be after verdict, the defendant in error shall be entitled to double costs, 13 C. 2, st. 2, c. 2, s. 10, whether the writ of error were sued out before or after execution.

So if judgment in an action be given against a plaintiff, and he bring a writ of error, and the judgment be affirmed or the writ of error discontinued, the defendant shall be entitled to his costs. 8 & 9 W. 3, c. 11, s. 2.

But if judgment be reversed, neither party is entitled to the costs in error; 2 Saund. 101, x. *Weyvil v. Stapleton*, 1 Str. 17; but the party succeeding will be entitled to his costs in the original action. *Gildart v. Gladstone*, 12 East, 668.

As to costs in error upon a bill of exceptions in ejectment, see *Francis v. Doe*, 4 Mees. & W. 331. 5 Id. 272.

Judgment, &c.] In four days exclusive after affirmance, the master will sign judgment and tax costs, &c. In error from the Exchequer, the costs are taxed by the master of that court. *R. G. Ex. Ch. M. 2 W. 4.* And the like in error from the other two courts respectively.

By stat. 11 G. 4, and 1 W. 4, c. 70, s. 8, "the proceedings and judgment, as altered or affirmed, shall be entered on the original record; and such further proceedings, as may be necessary thereon, shall be awarded by the court in which the original record remains."

And by R. G. H. 4 W. 4, r. 1, s. 16, "after judgment shall be given in the court of error in the Exchequer chamber, either party shall be at liberty to enter the proceedings in error on the judgment roll remaining in the court below, on a certificate of the clerk of the errors of the Exchequer chamber of the judgment given, for which a fee of 3s. 4d. and no more shall be charged."

The writs of execution can readily be framed from the forms in *Arch. Forms*, 218, 199, 200.

Where the judgment for a *plaintiff* is reversed in error, as the court in that case adjudge that the defendant shall be "restored to all things which he hath lost by occasion of the said judgment," the defendant, if the debt or damages have been levied and paid, may have a writ of restitution to have them refunded; see the form, *Arch. Forms*, 205; or if the damages be levied, but not paid, he shall have a *scire facias quare restitutionem non*; see the form, *Arch. Forms*, 204.

Where a judgment for a *defendant* is reversed, as the court of error in that case give the same judgment for the plaintiff that the court below ought to have done, the judgment in debt will be a final judgment. But the judgment in any other personal action will be interlocutory only; and the court where the record remains will thereupon award a writ of enquiry, and the damages may thereupon be assessed. See *Arch. Forms*, 201—203.

As to error *coram nobis* in the Queen's Bench, or *coram vobis* in the Common Pleas or Exchequer, see 2 *Saund.* 101, a. If error in law is to be assigned, the proceedings are the same as have been here detailed; and the same, if error in fact be assigned, and the defendant plead the common joinder or demur. But if error in fact be assigned, and the fact be put in issue, or confessed and avoided, then, although the proceedings up to the assignment of error are the same as have been here detailed, the remainder of the proceedings are the same, and the issues tried at *nisi prius* in the same manner, as in an

action. See *Sexton v. Astrop*, 1 Dowl. N. C. 14, 33, 17, 89, *ex. Arch. Forms*, 241—253. If the writ of error is brought for error in fact, there must be an affidavit of the fact, before the writ is allowed. *Birch v. Triste*, 15.

In treating of the writ of error, and in setting out the rules upon the subject verbatim, the reader will perceive that the clerk of the errors is often mentioned in them. It is sufficient perhaps here to mention that since those errors were made, the office of clerk of the errors, both in the exchequer chamber, and in the other courts, has been abolished, and the duties of the office are now performed by the clerks of the respective courts from which error is brought. 30, s. 2.

BOOK III.

PROCEEDINGS IN PARTICULAR ACTIONS.

CHAPTER I.

Ejectment.

SECTION 1.

Notice to quit.

In what cases.] A notice to quit is required by law, or by local custom, or by express stipulation between the parties. In the latter case, the notice must be such as has been agreed upon, whether the same would be required by law, or be sufficient, if no such stipulation existed, or not. See *Doe v. Rafter*, 6 Esp. 4. *Doe v. Bell*, 5 T. R. 471. *Doe v. Dobell*, 1 Ad. & El. N. C. 806. *Berrey v. Lindley*, 11 Law J., 27, cp. Where it is required by local custom, the custom will be considered as engrafted upon and forming part of the contract between the parties, and must be complied with.

In the absence of express stipulation or local custom upon the subject, if a tenant hold his land or house, &c. from year to year, either the landlord or he may determine the tenancy, by giving a half year's notice to quit, ending with the year of the tenancy: as if the tenant hold from Christmas to Christmas, the notice must be given half a year at least before Christmas, to quit at Christmas. And this although the rent be reserved quarterly or otherwise. *Spirley v. Newman*, 2 Esp. 266. And the same where a tenancy from year to year is implied by law, from holding over, or from the payment of rent, or the like. See *Doe v. Stennett*, 2 Esp. 217. *Doe v. Watts*, 7 T. R. 83. *Denn v. Rawlings*, 10 East, 261. *Doe v. Browne*, 8 East, 166. *Doe v. Noden*, 2 Esp. 530. *Roe v. Ward*, 1 H. Bl. 97. *Doe v. Walker*, 7 T. R. 478. *Doe v. Pullen*, 2 Hodg. 39. So, such notice must be given by a remainderman, when he becomes entitled in possession to land previously let to a tenant from year to year, before such tenancy can be determined. *Maddon v. White*, 2 T. R. 159.

In like manner, if the tenancy be from half year to half year, if a year's notice to quit must be given; if from quarter to quarter, a quarter's notice; if from month to month, a month's notice; and if from week to week, a week's notice: *See Doe Hazell*, 1 *Esp.* 94. *Doe v. Raffan*, 6 *Esp.* 4: if there be no express stipulation to the contrary.

But where the tenancy, by express stipulation, is to end on certain day, then a notice to quit is not necessary. *Cobb v.okes*, 8 *East*, 358. *Messenger v. Armstrong*, 1 *T. R.* 54. *ght v. Darby*, 1 *T. R.* 162. Nor is it necessary, where the tenant holds under an adverse title, *Doe v. Williams, Coup.* 12, and see *Doe v. Quigley*, 2 *Camp.* 505, or has done any act which amounts to a disclaimer or disavowal of his lessor's title. *oe v. Pasquali, Peake*, 196. See *Doe v. Cooper*, 1 *M. & Gr.* 5. Nor is it necessary to be given by a mortgagee, if the tenancy were created by the mortgagor after the date of the mortgage; *Reech v. Hall*, 1 *Doug.* 21. *Thunder v. Belcher*, 3 *ut*, 449. *Doe v. Boulton*, 6 *M. & S.* 148. See *Doe v. Gold-* in, 10 *Law J.*, 275, *qb.*; nor by a tenant by elegit, if the tenancy have been created by the creditor after the date of the judgment. *Doe v. Hilder*, 2 *B. & A.* 782. And where, by a contract for the purchase of land, the vendee was let into possession immediately, and was to pay five per cent. interest on the purchase money, if the contract were not completed within twelve months, until its completion; the contract was not completed within the time, and he remained in possession, but it did no interest: it was holden that the vendor might maintain an action against the vendee without giving a notice to quit, the latter was nothing more than a tenant at will. *Doe v. amberlaine*, 9 *Law J.*, 38, *ex.*

[By landlord.] It must be given by the landlord, or by the person who may have succeeded him in the title, as heir, assignee, &c. or by his agent. See *Doe v. Phillis*, 2 *Chit.* 170. *v. Pearce*, 2 *Camp.* 96. *Doe v. Read*, 12 *East*, 57. A notice to quit given by one of two joint tenants, will have the effect of determining the tenancy as to his moiety; *Doe v. spin*, 3 *Taunt.* 120; but if it be intended to determine the tenancy as to all, if given by one, it must either be signed by or given expressly on the behalf of all; *Doe v. Summersett*, 1, & *Ad.* 135; or if given by an agent on behalf of all, it will determine the tenancy as to all, although he be authorized by one of them only, *Doe v. Hughes*, 7 *Mees. & W.* 139, and it is sufficient if his authority be subsequently recognized by them. *ndtitle v. Woodward*, 3 *B. & A.* 689. *Doe v. Sybourn*, 2 *ut*, 877, but see *Doe v. Walters*, 10 *B. & C.* 626. It must be given to the landlord's immediate tenant, see *te v. Smith*, 1 *B. & P.* 174, or to his executor or other personal representative, *Doe v. Porter*, 3 *T. R.* 13. *Parker v. unstable*, 3 *Wils.* 241, or assignee; *Doe v. Williams*, 6 *B. & C.*

41; but not to an under-tenant. *Pleasant v. Benson*, 14 East, 234. Where the premises were holden by two tenants in common, a notice served upon one of them was holden to determine the entire tenancy; *Doe v. Crisp*, 5 Esp. 196; at least it raises a presumption that the notice reached the other tenant in common, although he possibly live at a distance. *Doe v. Watkins*, 7 East, 551.

By tenant.] If a notice to quit be given by the tenant, it should be given to his immediate landlord, or the person to whom he is bound to pay his rent, or to his landlord's agent; and not to any head landlord or person under whom his immediate landlord claims. In other respects the same rules apply to this notice as to a notice to quit by a landlord. If in this notice a mistake be made as to the expiration of the year or month, &c. of the tenancy, it will not have the effect of determining the holding, and the tenant himself may take advantage of the defect; it is not good as a notice to quit, nor does it operate as a surrender, inasmuch as it is to take effect in futuro. *Doe v. Milward et al.*, 3 Mees. & W. 328.

Form and service.] A notice to quit is usually in writing, and in prudence should be so; but a parol notice to quit, given by a tenant holding under a parol lease, has been deemed sufficient, *Timmins v. Rawlinson*, 3 Burr. 1603. *Doe v. Crick*, 5 Esp. 196, even though given on the part of a corporation. *Roe v. Pierce*, 2 Camp. 96. It is usually directed to the tenant; but this is not necessary, if it be personally served upon him. *Doe v. Wrightman*, 4 Esp. 5, and see *Doe v. Spiller*, 6 Esp. 70. Care must be taken that the time at which it requires the tenant to quit, be the expiration of the year or month of his tenancy; see *Roe v. Ward*, 1 H. Bl. 97. *Doe v. Walzer*, 1 T. R. 478. *Doe v. Donovan*, 1 Taunt. 555. *Kempt v. Derrett*, 3 Camp. 510, and see *Doe v. Lambly*, 2 Esp. 635; for any mistake in the notice in this respect, will be fatal. *Doe v. Lea*, 11 East, 312, and see *Johnstone v. Huddleston*, 4 B. & C. 923. In order to avoid this, however, the notice now usually requires the tenant to quit at the end and expiration of the current year of his tenancy, which shall expire next after the end of one half year from the date thereof; and which has been holden to be good. *Doe v. Butler*, 2 Esp. 589. Care must be taken also to describe the premises correctly. *Doe d. Cos v. —*, 4 Esp. 185. And a notice as to part only of the premises, will be bad. *Doe v. Archer*, 14 East, 245. See *Doe v. Church*, 3 Camp. 71. As to the notice where the tenant is to quit different parts of the premises at different times, see *Doe v. Howard*, 11 East, 498. *Doe v. Watkins*, 7 East, 551. *Doe v. Ld. Grey de Wilton*, 2 East, 384, n. *Doe v. Spence*, 6 East, 120. *Doe v. Snowden*, 2 W. Bl. 1224. *Doe v. Hughes*, 7 Mees. & W. 139. The following may be the form of the notice:

—I hereby [as agent for Mr. John Nokes your landlord, his behalf], give you notice to quit and deliver up possession of the [house, land and premises, with the appurtenances] at — in the county of —, which you hold of him as thereof, on the [twenty-fifth day of March next,] or at expiration of the current year of your tenancy, which shall next after the end of one half year from the date of this

Dated the — day of — 1843.

fr. Joseph Styles.

James Nokes.

e duplicates of this notice, and compare them carefully. serve one of them upon the tenant, personally if you or if you cannot meet with him, you may serve it upon the tenant or servant at his dwelling-house, explaining to them at the same time the nature of the notice, and it will be presumed that it came to his hands. See *Jones v. Marsh*, 4 T. R. 202. *Doe v. Lucas*, 5 Esp. 153. *Smith v. Clark*, 9 Dowl. 202. Make a memorandum of the day and manner of service of the other copy, and keep it.

SECTION II.

Ejectment in ordinary cases.

shall consider the practice in ejectment, under the following heads :—

Ejectment in ordinary cases.

Ejectment where the possession is vacant.

Ejectment by landlord against tenant.

Ejectment in ordinary cases.

Declaration and service, &c.

[*Declaration.*] The declaration is the first proceeding in ejectment. If it be an ordinary case, you may get blank forms from the stationer's, and fill them up; but if the case be of importance, and if any difficult matter of title be involved in it, it is prudent to have your declaration drawn by a barrister or solicitor. Make as many copies of it as there are defendants.

The declaration is usually intitled of the previous term. But if by mistake it be intitled of a subsequent term, see *Doe v. Roe*, 2 Dowl. 186, *Doe d. Gore v. Roe*, 3 Dowl. 5, *Crooks v. Roe*, 6 Dowl. 184. *Doe d. Brook v. Roe*, 9 Dowl. 347, or intitled of a year that has not arrived, or of a year which is past, *Doe d. Smithers v. Roe*, 4 Dowl. 374. *Doe*

d. Wils v. Roe, 5 Dowl. 380, but see *Doe d. Gowland v. Roe*, 5 Dowl. 273, it is immaterial, if the notice at the foot of the declaration be dated correctly, and require the tenant to appear in the next term. So where the declaration, instead of being intituled of the term, was intituled with the day of the month and year, as in a personal action, the court held it to be immaterial. *Doe d. Ashman v. Roe*, 1 Bing. N. C. 253. But if the declaration be intituled of a term which has not arrived, and the notice at the foot be not dated and do not otherwise specify correctly when the tenant is required to appear, the court will not grant judgment against the casual ejector, *Doe d. Newman v. Roe*, 9 Dowl. 131. *Doe d. Giles v. Roe*, 7 Id. 519. *Doe d. Channell v. Roe*, 9 Id. 67, *Doe d. Rogers v. Roe*, 2 Dowl. 392, even although the mistake be explained verbally to the tenant. *Doe d. Tolley et al. v. Roe*, 12 Law J., 97, *qb*.

Ejectment is not within R. G. M. 3 W. 4, s. 15, as to the commencement of declarations; *Doe d. Gillett v. Roe*, 2 Dowl. 690; but the declaration commences in the form stated in R. G. H. 2 W. 4, r. 4, viz.:—"Richard Roe was attached to answer John Doe in a plea of trespass and ejectment." For that, &c. going immediately to the demises, entries and ouster, omitting all recital of the supposed writ, as was formerly the practice. It is not necessary that any attorney's name should be mentioned in it. *Doe d. Simpson v. Roe*, 6 Dowl. 469. The demises must be laid of a date subsequent to the accruing of the lessor's title; *R. v. Walker*, 7 T. R. 433; and if it be necessary or desirable to lay a demise in the name of any other person than the client, it may be prudent first to obtain his permission to do so. See *Doe v. King*, 2 Dowl. 580. *Doe d. Shepherd v. Roe*, 2 Chit. 171. *Doe v. Fillis*, Id. 170. *Doe v. Figgins*, 3 Taunt. 440.

As to the notice at the foot of the declaration, it must be directed to the tenant in possession, or to all the tenants if there be more than one; but in this latter case the copy served upon such tenant may be directed to him alone. *Doe d. Field v. Roe*, 1 Har. & W. 516. If there be a mistake in the christian name of the tenant, the court will neither set aside the service of the declaration, *Doe d. Stainton v. Roe*, 6 M. & S. 203, nor refuse the rule for judgment against the casual ejector, *Doe d. Folkes v. Roe*, 2 Dowl. 567. *Doe d. Frost v. Roe*, 3 Dowl. 563, 1 Har. & W. 217. *Doe d. Peach v. Roe*, 6 Dowl. 62, on that ground; for that would be giving the tenant the benefit of a plea in abatement, which was never allowed in ejectment. And the same, where the christian name, for reasons, was omitted altogether. *Doe d. Warns v. Roe*, 2 Dowl. 517. See *Doe d. Pearson v. Roe*, 5 Moore, 73. *Doe v. Roe*, 6 Dowl. 629. *Doe d. Smith v. Roe*, Id. But where it was directed to one person, and served upon another, it was holden bad. *Doe d. Smith v. Roe*, 5 Dowl. 254. So, where it was directed to "the personal representatives" of a deceased tenant, with-

aming them, it was holden bad. *Doe d. St. Margaret's Minister, v. Roe*, 1 *Moore*, 113. *Anon.* 1 *Chit.* 162. It mentions the time at which the tenant is to appear, y, in country causes, the next term generally, and in causes the first day of the next term. Where it omits the term altogether, *Doe v. Roe*, 1 *Crompt. & J.* 330, where it required the tenant to appear "in next Hilary," omitting the word "term," *Doe d. Dimond v. Roe*, 8 *Dowl.* 308, and where it required the tenant to appear within ten days, being immediately before the term, *Anon.* 1 *Dowl.* 18, it was held sufficient; but in a later case, where the notice required the tenant to appear "in due time," the court held it bad and said that if the form as to the period of appearance thus disregarded, the notice would in time become useless. *Doe d. Isherwood v. Roe*, 2 *Nev. & M.* 476. *Doe d. v. Roe*, 2 *Dowl.* 420. If it requires the tenant to appear at a wrong time, the court will grant a rule nisi to amend it, *Bass v. Roe*, 7 *T. R.* 469, or a rule nisi for judgment. *Watts v. Roe*, 5 *Dowl.* 149, *S. C.* 2 *Har. & W.* 138 *nom. Doe Souls' College v. Roe*. Where, for instance, it required the tenant to appear in Michaelmas term, but from there being a number of tenants to serve, it was found impossible to move in that term, the court in Hilary term granted a rule for judgment against the casual ejector, unless cause were shown on or before the last day but one of the term. *Doe d. Earl Warren v. Roe*, 9 *Dowl.* 714. Where it omitted to state the consequence of the tenant's not appearing, it was holden bad, but it could be amended. *Doe d. Darwent v. Roe*, 3 *Dowl.* 336. If it was by mistake subscribed in the name of the nominal plaintiff, instead of the casual ejector, the court held the declaration to be immaterial. *Hazlewood v. Thatcher*, 3 *T. R.* 350. In such cases the court will allow the declaration to be amended, see *ante*, p. 118.

[*ice of declaration, when and how.*] The declaration must be made before the first day of term. *R. G. T.* 1 *W.* 4, s. 11. *See Doe d. Frodsham v. Roe*, 6 *Dowl.* 479. But in prudence it is better to have the declaration made some days before that, at all likely that the tenant or his wife will keep out of the way in order to avoid the service. It cannot be served on the tenant by day; *Doe v. Roe*, 8 *D. & R.* 592, 5 *B. & C.* 764, *per Abbot J.*; and even where the declaration was left for the tenant at his house on the Saturday, and he afterwards acknowledged that he received it on the Sunday, the service was insufficient. *Id. Doe d. Warren v. Roe*, 8 *D. & R.* 342. The person serving it, should deliver it personally to the tenant or his wife. But where the attorney's clerk offered it to the tenant and he refused to take it, and the clerk then left it on the table in the room; *Doe d. Visger v. Roe*, 2 *Dowl.* 449; where the clerk offered it to the wife of the tenant, and she refused

it, he then laid it on the table, and was going away, but she threw it after him, and he then fixed it upon a conspicuous part of the premises; *Doe d. Courthorpe v. Roe*, 2 Dowl. 441; and where he began to read and explain it to the tenant, but before he could deliver it to him, he turned him out of the house, and the clerk then put it under the door: *Doe d. Frith v. Roe*, 3 Dowl. 569: in these cases the service was deemed sufficient. But in a similar case, where the clerk, instead of leaving the declaration, brought it away, Parke, J. said he could only grant a rule nisi. *Doe d. Forbes v. Roe*, 2 Dowl. 452. Also, at the time the declaration is served, the notice at the foot of it should be read over and explained to the party: reading it over without explaining it, or explaining it without reading it over, will be sufficient. *Doe v. Roe*, 2 Dowl. 199. *Doe v. Roe*, 1 Dowl. 428; but see *Doe d. Wade v. Roe*, 6 Dowl. 51, *cont.* Where the tenant himself read it over, and said that he understood it, it was holden sufficient. *Doe v. Roe*, 1 Dowl. 518. Where the tenant was a Welshman and did not understand English, and the person who served him could not speak Welsh, but he got another of the tenants to explain the declaration and notice to him: this was holden sufficient. *Doe d. Probert v. Roe*, 3 Dowl. 335. Where upon calling to serve a declaration upon a woman, the clerk was informed that she was bedridden; he then gave the declaration to the person to take to her, and to read it over and explain it to her, and the person accordingly took it up stairs, and he heard him read and explain it to some person, who he was informed was the tenant: this was holden sufficient. *Doe d. Tucker v. Roe*, 1 Har. & W. 671. But if, when the clerk begins to read or explain it, the tenant or his wife refuse to listen to him, *Doe d. Neale v. Roe*, 2 Wils. 263. *Doe d. George v. Roe*, 3 Dowl. 541. *Doe d. Nash v. Roe*, 8 Dowl. 305, or turn him out, *Doe d. Frith v. Roe*, 3 Dowl. 569, or refuse to let him into the house, and he read it on the outside, and explain it to the tenant's son: *Doe d. Grimes v. Roe*, 1 Har. & W. 671: this has been holden sufficient to entitle the party to judgment against the casual ejector. So, where the tenant was an attorney, and on that account the notice was not explained to him: the court held it to be sufficient. *Doe d. Duke of Portland v. Roe*, 3 Man. & Gr. 397. It may be necessary to observe that this explanation, as well as the service, must be before the first day of term. See *Doe v. Roe*, 1 D. & R. 563. If there be any thing defective in this part of the service, the court will only grant a rule nisi. See *Doe d. Downes v. Roe*, 1 Har. & W. 671. *Anon.* 2 Chit. 182.

Service upon the tenant or his wife.] The declaration should be served either upon the tenant himself, or upon his wife; this is the only regular mode of service. On the tenant himself, it may be served any where; even abroad. *Doe d. Daniell*

droffe, 7 Dowl. 494. 8 Law J., 254, ex. And a service he tenant himself, will be good, although he be a lunatic, usually confined as such in an asylum. *Doe d. Gibbard v. 3 Man. & Gr.* 87. But the affidavit must state him ex-to be "tenant in possession," no other form of words seemed equivalent; *Doe d. Jackson v. Roe*, 4 Dowl. 609, *Henson, J. Doe v. Hitchcock*, 2 Dowl. N. C. 1; stating the to be on "persons in possession," *Doe d. Oldham v. Dowl.* 714, or on "the occupier," *Doe d. Jackson v. Roe*, 4. 609, or even stating facts from which it may clearly that the party served was tenant in possession, *Doe d. Roe*, 5 Dowl. 226, will not be sufficient. So, it will sufficient to swear to the deponent's "belief," that the served was tenant in possession, *Doe v. Badtittle*, 1 Chit. *Doe d. Talbot v. Roe*, 1 Har. & W. 367, except under peculiar circumstances, and then the court will grant a nisi only. *Doe d. George v. Roe*, 3 Dowl. 22. Even where affidavit stated a service on A. B. and C. D. "tenants in sion as executors," the court held it insufficient, as the "as executors" qualified those which preceded them. *Roe*, 2 Tyr. 158, 1 Dowl. 295. Also, an affidavit of : on the executors or administrators of a deceased tenant, state them to be "tenants in possession;" *Doe v. Hurst*, . 62. *Doe d. Rigby v. Roe*, 4 Dowl. 14; and where there other tenant, if the interest of the deceased were only of tel nature, the affidavit may be in the common form, ing the executors, &c. (not in their representative cha-) as tenants in possession, notwithstanding they were the actual occupation of the premises. *Per Coleridge*, *Dowl.* 15. See *Doe d. Pamphilon v. Roe*, 1 Dowl. N. C. 186. : the premises had been let to J. S., but when a declara- ejectment was about to be served he was no longer in sion, but another person, who declared he was the : in possession, but refused to tell his name; the clerk filled in the name of J. S. in the copy, and served it on rson who represented himself to be tenant: and this olden sufficient for a rule nisi for judgment. *Doe d. ygram v. Roe*, 2 Dowl. N. C. 672. on the wife of the tenant in possession, the declaration e served, either upon the premises for which the action ight, or at the husband's dwelling-house, *Doe v. Bayliss*, R. 765. *Doe d. Baddam v. Roe*, 2 B. & P. 55. *Doe v. Dowl.* 693. *Doe d. Ld. Southampton v. Roe*, 1 Hodg. 24. . *Mitchell v. Roe*, 1 Har. & W. 646. *Doe d. Graff v. Roe*, . 456. *Doe d. Boulcott v. Roe*, 7 Dowl. 463, 8 Law J., x., or place of business, see *Doe v. Roe*, 1 Dowl. 67, or at ther place, if it appear from the affidavit that the wife ving with her husband at the time. *Jenney v. Cutts*, 1 Rep. 308. *Per Ld. Kenyon*, 6 T. R. 765. *Per Cur. in l. Briggs v. Roe*, 1 Dowl. 312. And a service upon the

wife, on the premises, will be good, even although the husband have left the kingdom and have settled abroad. *Doe v. Roe*, 1 D. & R. 514. But if the affidavit merely state a service upon the wife, without saying where, &c. *Doe v. Roe*, 2 Dowl. 89. *Doe d. Mingay v. Roe*, 6 Dowl. 182, or a service upon her at a place off the premises, not being the house or place of business of the husband, without shewing that she was then living with her husband, *Oates v. Cotes*, 6 T. R. 765. *Right v. Wrong*, 2 D. & R. 84, or if the affidavit do not state positively that the woman served is the wife of the tenant in possession,—as if it state a service upon the “wife or mother” of the tenant, *Doe v. Roe*, 1 Dowl. 614, or upon a woman representing herself to be the wife, without adding the deponent’s belief that she is so: *Doe d. Simmons, v. Roe*, 1 Chit. 228. See *Doe d. Grange v. Roe*, 1 Dowl. N. C. 274: in all these cases the affidavit would be bad. Where however the affidavit stated a service upon the wife “near the premises,” Coleridge, J. granted a rule nisi, to be served personally upon the husband. *Doe d. Marquis of Bath v. Roe*, 7 Dowl. 692. So where the affidavit stated a service upon a woman on the premises who represented herself to be the wife of the tenant, and was reputed to be so, and lived with him there: Littledale, J. held it sufficient for a rule nisi. *Doe d. Bremner v. Roe*, 8 Dowl. 135. The following may be the form of the affidavit, where the service is upon the tenant or his wife:—

In the, &c.

*Between John Doe, on the several demises
of A. B. & C. D., plaintiff,
and*

Richard Roe, defendant.

J. B., clerk to E. F. of —, gentleman, attorney for the lessors of the plaintiff in this cause, maketh oath and saith, that he did, on the — day of — instant, [personally] serve Joseph Styles, tenant in possession of [part of] the premises, mentioned in the declaration of ejectment hereunto annexed, with a true copy of the said declaration, and of the notice thereunder written “[if the service were upon the wife,” by delivering the same to the wife of the said Joseph Styles upon the premises aforesaid, “or” at the dwelling house and place of residence of the said Joseph Styles, situate in —, &c. vide supra]; and this deponent at the same time read over to [the said wife of] the said Joseph Styles the said notice, and explained to [her or him] the intent and meaning of the said declaration and notice, and of the service thereof. As to the title of the affidavit, see p. 162. Where several tenants are served, if the services be regular, they may all be included in one affidavit.

If there be several tenants, each must be served; otherwise you can only have judgment against those actually served. *Doe v. Moore*, 2 Chit. 176. *Doe d. Elwood v. Roe*, 3 Moore, 578.

Even where the ejectment was for premises which had been demised to A, and by him underlet to B, C, and D, it was holden necessary to serve all the undertenants with a copy of the declaration. *Doe d. Ld. Darlington v. Cook*, 4 B. & C. 259. But if the tenants in possession be joint tenants, then a service upon one, will be a service upon all. *Doe d. Bailey v. Roe*, 1 B. & P. 369. *Doe d. Huichinson v. Roe*, 2 Dougl. 418, and see *Doe d. Jordan v. Roe*, 4 Dougl. 577. *Doe d. Weeks v. Roe*, 5 Dougl. 405. *Doe d. Clothier v. Roe*, 6 Dougl. 291. But if the affidavit do not expressly state them to be joint tenants, the court will only grant a rule nisi. *Doe d. Grimes v. Roe*, 4 Dougl. 86, 1 Har. & W. 369. Where one of two joint tenants was dead, and the declaration was served on the survivor, the rule for judgment was granted against the survivor only. *Doe d. Hewson v. Roe*, 5 Dougl. 404.

Service on servant, &c. with admission of receipt by the tenant.] If after service upon a child, or servant, or other person, upon the premises, or elsewhere, *Doe d. Harris v. Roe*, 2 Dougl. 607, the tenant acknowledge that he received the declaration before the first day of the term, this is deemed equivalent to a personal service upon the tenant; and upon an affidavit of the fact, the court will grant a rule for judgment against the casual ejector, as of course. *Doe d. Tindale v. Roe*, 2 Chit. 180. *Doe d. Macdougall v. Roe*, 4 Moore, 20. *Doe v. Roe*, 1 Dougl. 365. *Doe d. Walker v. Roe*, 1 Price, 399. See *Doe d. Emsley v. Roe*, 1 M. & Gr. 840. *Doe d. Agar v. Roe*, 6 Dougl. 624. And the same, if the acknowledgment be by the tenant's attorney. *Doe v. Snee*, 2 D. & R. 5. *Anon.* 2 Chit. 187. *Doe d. Gibbard v. Roe*, 9 Dougl. 844. But where the tenant on the first day of the term acknowledged that he had received the declaration, but not that he had received it before the term, Coleridge, J. held it to be insufficient. *Doe d. Harris v. Roe*, 1 Har. & W. 372. See *Doe d. Smith v. Roe*, 4 Dougl. 265, per Alderson, B. cont. So where the tenant acknowledged that he had received the declaration, but declined to say, or did not say, when he had received it, it was holden to be insufficient. *Doe d. Finch v. Roe*, 5 Dougl. 225. *Doe d. Marshall v. Roe*, 4 Nev. & M. 553. *Doe d. Martin v. Roe*, 1 Har. & W. 46. *Roe v. Doe*, 14 East, 441. So an acknowledgment by the wife of the receipt of the declaration either by herself or her husband, will not be sufficient, although she admit the receipt to have been before the first day of term; *Goodtitle d. Read v. Badtittle*, 1 B. & P. 384. *Doe d. Tucker v. Roe*, 2 Dougl. 775. See *Doe d. Wilson v. Smith*, 3 Dougl. 379. *Doe v. Roe*, 2 Tyr. 211; except perhaps for a rule nisi. *Doe d. Morgan v. Roe*, 1 Dougl. N. C. 543. *Doe d. Chaffey v. Roe*, 9 Dougl. 100. Nor will the acknowledgment of any third party be sufficient, even for a rule nisi. *Doe d. Harris v. Roe*, 1 Dougl. N. C. 704.

Service on servant, &c. where it is probable that the tenant received it.] A service upon the son or daughter or servant of the tenant in possession, although upon the premises, will not of itself be sufficient. *Roe d. Hamsbrook v. Doe*, 14 East, 441. *Right d. Freeman v. Roe*, 2 Chit. 180. *Doe d. Smith v. Roe*, 1 Dowl. 614. *Doe v. Roe*, 2 Dowl. 414. *Doe d. George v. Roe*, 3 Dowl. 9. *Doe d. Tibbs v. Roe*, 3 Dowl. 380. *Doe d. Mitchell v. Roe*, 1 Har. & W. 646. *Goodtitle d. Mortimer v. Notile*, 2 D. & R. 232. *Doe d. Halsey v. Roe*, 1 Chit. 100. *Doe d. Jones v. Roe*, 1 Chit. 213. *Doe d. Emerson v. Roe*, 6 Dowl. 736. *Doe d. Ginger v. Roe*, 9 Dowl. 336. *Doe d. Shepherd v. Roe*, 10 Law J., 129, *qb.* Nor will a service upon a person who professes to be agent for the tenant, where no circumstances appear from which the agency can be inferred; *Doe d. Nottage v. Roe*, 1 Dowl. N. C. 750. *Doe d. Sturch v. Roe*, 1 H. & W. 672; the court will not even grant a rule nisi in such a case. *Doe d. Read v. Roe*, 1 Mees. & W. 633. *Doe d. Id. Dinorben v. Roe*. 2 Id. 374. But if, from circumstances stated in the affidavit of service, it appear clearly that the declaration, although served upon the son, &c. afterwards and before the first day of the term came to the hands of the tenant, the court will grant the rule for judgment; or if it appear merely probable, they will grant a rule nisi. *Doe d. Timmins v. Roe*, 6 Dowl. 765. A few cases will illustrate this. Where the declaration was served upon a servant of the tenant, on the premises, who promised to deliver it to her master, and it was afterwards on the same day seen in the hands of the tenant's attorney, Taunton, J. granted a rule nisi. *Doe v. Roe*, 2 Dowl. 184. So where the declaration was served upon the son-in-law of the tenant, near the premises, and the tenant's attorney afterwards took out a summons for particulars of the demise, Wightman, J. held it to be sufficient for a rule nisi. *Doe d. Evans v. Roe*, 2 Dowl. N. C. 334. So where the service was on a servant of the tenant, and she made an affidavit stating that she delivered the declaration to her master, Taunton, J. granted a rule nisi. *Doe v. Roe*, 2 Dowl. 198. So where the service was upon the daughter of the tenant, on the premises, who said her father was very ill up stairs; she took the declaration up stairs, came down again, and said she had told him and explained it to him: this was holden sufficient. *Doe v. Roe*, 1 Dowl. 692. So where it was served upon the daughter of the tenant, who was then confined by indisposition, and she afterwards informed the clerk that she read it over and explained it to the tenant before the term, the court granted a rule nisi. *Doe v. Roe*, 2 Dowl. 12. *Doe d. Threader v. Roe*, 1 Dowl. N. C. 261. *Doe d. Frost v. Roe*, 8 Dowl. 301. *Doe d. Elderton v. Roe*, 1 Dowl. N. C. 585. So where it was served upon the tenant's nephew upon the premises, who acted as servant to his uncle, and who said at the time that his uncle refused to be seen; this was holden sufficient for a rule nisi. *Doe d. Moody*

v. Roe, 8 Dowl. 306. So where service was upon a servant at the tenant's house, who stated that she knew what it was about, as the lessor of the plaintiff had already been there to effect service, and could not; a copy of the declaration was also stuck up upon the premises: this was deemed sufficient or a rule nisi. *Doe d. Wright v. Roe*, 6 Dowl. 455. Where it was served upon the wife of the tenant's brother, on the premises, who said the tenant did not reside there, and would not tell where he did reside, and she afterwards told another person she would go to London to the tenant, and she left the premises the next morning: Coleridge, J. granted a rule nisi. *Doe d. Hubbard v. Roe*, 1 Har. & W. 371. See *Doe d. Weatherell v. Roe*, 2 Dowl. 441. So where the declaration was served on the tenant's son upon the premises, and the party who served it, on his return, met the tenant, and stated to him the service and the object of it, who immediately answered "then I have no time to lose;" Patteson, J. held it to be sufficient for a rule nisi. *Doe d. Brickfield v. Roe*, 1 Dowl. N. C. 270. But where the declaration was served on the brother-in-law of the tenant, on the premises in Shropshire, the tenant being then dangerously ill at Worcester, and on the next day service was made on a person at the house where the tenant was lying, and on the same day he died: Coleridge, J. refused the rule, saying that it was unlikely that any papers should have been delivered to the tenant in the state in which he then was. *Doe d. Hartford v. Roe*, 1 Har. & W. 352. So where service was effected upon a servant of the tenant upon the premises, who promised to give the declaration to his master, and the premises afterwards were found deserted: Wightman, J. refused to grant even a rule nisi. *Doe d. Dobler v. Roe*, 2 Dowl. N. C. 333.

So, service on the tenant's attorney, will not be sufficient, although he accept the declaration and undertake to appear for him: *Doe v. Roe*, 1 Dowl. 613; unless it appear that the tenant himself at least knew of it before the first day of term.

[Service, where the tenant keeps out of the way to avoid it.] If the service be merely upon the son or servant, &c. of the tenant, yet if, from circumstances stated in the affidavit of service, it appear that the tenant kept out of the way for the purpose of avoiding personal service, and the deponent add his belief that he did so, the court will grant a rule to show cause why the service should not be deemed good service, and will direct the manner in which the rule shall be served. See *Doe d. Luff v. Roe*, 3 Dowl. 575. *Doe d. Morpeth v. Roe*, Id. 577. *Doe d. Childers v. Roe*, 2 Har. & W. 121. *Doe d. Croley v. Roe*, 2 Dowl. N. C. 344. Where the clerk, intending to serve the declaration, went to the tenant's house, knocked at the door, and received no answer, but he heard some

one, whom he believed to be the tenant, come to the door and listen, and he then read the declaration aloud and explained the object of it, and put a copy of the declaration through a broken pane of a window near the door: *Patteson, J. granted a rule nisi. Doe d. Frost v. Roe, 3 Dowl. 314; and see Doe d. Wills v. Roe, Id. 582. Doe d. Colson v. Roe, 6 Dowl. 765. Doe d. Lowndes v. Roe, 10 Law J., 142, ex.* So where the clerk went to the tenant's house, and knocked at the door, which was shut, but received no answer; he looked through a window, and seeing the tenant's niece in the house, he knocked again, but could not get in; he then explained through the door, the nature and object of the service, and pasted a copy of the declaration on the door; and he afterwards learned from the tenant's attorney that the copy of the declaration had been received: *Parke, J. granted a rule nisi. Doe d. Mortlake v. Roe, 2 Dowl. 444.* So where the clerk called at the house of the tenant on the premises, to serve him with the declaration, and left a copy of the declaration and notice, but was told that he and his wife were at Worcester; he then went to the house of the tenant's brother-in-law at Worcester, and not wishing to ask directly for the tenant, enquired for the wife, and the servant said she was there; but the brother-in-law came out, and said he did not know where the tenant was, and turned the clerk out of his house, the clerk, however, leaving another copy of the declaration and notice there; and the affidavit stated the deponent's belief that the tenant was in the house at Worcester at the time, but was denied in order to avoid the service: *Coleridge, J. granted a rule nisi. Doe d. Turncroft v. Roe, 1 Har. & W. 371.* So where the tenant himself admitted afterwards that he had kept out of the way to avoid the service, the court granted a rule nisi. *Anon. 2 Chit. 186.* So where the servant admitted that the tenant was in the house, but refused to allow the clerk to see him, the court granted a rule nisi. *Doe d. Harvey v. Roe, 2 Prior, 112.* So where the tenant built a wall round the premises to prevent access to them, and the attorney's clerk upon application to the tenant's counting-house, upon several occasions, was refused to be admitted to him, and upon the last occasion, after leaving a copy of the declaration and notice, he was turned out; this was holden sufficient for a rule nisi. *Doe d. Barrow v. Roe, 1 M. & Gr. 238.* But where it was stated that the tenant's wife afterwards admitted that she had taken care that her husband should not be in the way, the Court of Common Pleas held that this admission of the wife could not be received against her husband, and refused the rule. *Doe v. Smith, 3 Dowl. 379.* So merely swearing to the deponent's belief that the tenant keeps out of the way to avoid service, without stating circumstances also from which that may be implied, will not be sufficient for even a rule nisi. *Doe d. Jones v. Roe, 1 Chit. 213.* So calling at the house,

finding it shut up, and nobody in it, and then fixing a declaration on the door, will not be sufficient; the party in that case should proceed as upon a vacant possession. *Doe v. Roe*, 4 Dowl. 173. *Doe d. Norman v. Roe*, 2 Dowl. 428, 399. *Doe d. Schovel v. Roe*, 3 Dowl. 691. *Doe d. Ld. Darlington v. Cock*, 4 B. & C. 259. *Doe d. Roupel v. Roe*, 1 Har. & W. 367. See *Fenn v. Roe*, 1 New Rep. 293. *Doe d. Evans v. Roe*, 4 Moore, 469. *Doe d. Burrows v. Roe*, 7 Dowl. 326. *Doe d. Showell v. Roe*, 2 Cr. M. & R. 42. See *Doe d. Hindle v. Roe*, 3 Mees. & W. 279. The affidavit in this case is similar to the affidavit of service upon the wife, as *ante*, p. 156, stating a service upon the "tenant in possession," by doing so and so, stating the particulars. See *Doe d. Childers v. Roe*, 2 Har. & W. 121; and see *Arch. Forms*, 371.

Service, in what cases good, from necessity.] If the tenant have gone abroad, and have left an agent, servant, or other person upon the premises, upon such person being served, and a copy of the declaration and notice stuck up upon the door or other conspicuous part of the premises, the court will grant a rule to show cause why such should not be deemed to be good service, and that the rule may be served in the same way. *Doe d. Robinson v. Roe*, 3 Dowl. 11. *Doe v. Roe*, 4 B. & A. 653. *Doe d. Treat v. Roe*, 4 Dowl. 278. 1 Har. 526. *Doe d. Scott v. Roe*, 8 Dowl. 254. *Doe d. Potter v. Roe*, 1 Hodg. 316. See *Roe d. Fenwick v. Doe*, 3 Moore, 576. *Doe d. Osbaldiston v. Roe*, 1 Dowl. 456. Where the action was for land, which had no house upon it, and the tenant or his present residence could not be found: upon an affidavit stating a service of the declaration upon his agent, leaving a copy at the tenant's last known place of residence, and affixing another copy in a conspicuous place on the land, Patteson, J. granted a rule *nisi*. *Doe d. Johnson v. Roe*, 12 Law J., 97, *qb*. Where the Manchester railway company were the tenants in possession, and the declaration was served upon their book-keeper, on a part of the premises which he occupied and where he slept, Parke, J. held it to be sufficient. *Doe v. Roe*, 1 Dowl. 23. Where the East India Company were tenants in possession, a service on their secretary was deemed sufficient. *Doe d. Cooper's Company v. Roe*, 8 Dowl. 134. And where the Grand Junction Canal company were the tenants in possession, and the declaration was served upon their clerk upon the premises, but he did not reside there, Coleridge, J. granted a rule *nisi*. *Doe d. Ross v. Roe*, 5 Dowl. 147. 2 Har. & W. 124. *Doe d. Fisher v. Roe*, 10 Mees. & W. 21. *Anon.* 2 Chit. 181. Where the action was for a chapel, a service on the surviving leasees and the sexton, as holden sufficient; *Doe d. Kirschner v. Roe*, 7 Dowl. 97; and where in such a case a tenant had gone abroad, a service on his wife and on the clerk with whom he had left the keys, was deemed sufficient. *Doe d. Dickens v. Roe*, 7 Dowl. 121.

See Doe d. Gray v. Roe, Id. 700. *Doe d. Earl Somers v. Roe, 8 Dowl.* 292. But where the action was brought for land which had been illegally taken into a road: a service of the declaration upon the commissioners of the road, and their clerk, was holden insufficient, because it could not be said that they, or that any persons were in possession. *Doe d. White v. Roe, 8 Dowl.* 71. Where the tenant in possession was a lunatic, and the declaration was served upon a person who had the care of him and the management of his affairs, although not regularly appointed as his committee, the court granted a rule nisi; *Doe d. Ld. Aylesbury v. Roe, 2 Chit.* 183; but otherwise where the service was merely upon his daughter, who carried on business for him, he himself being resident elsewhere. *Doe d. Brown v. Roe, 6 Dowl.* 270. Where the tenant was a bankrupt, and the declaration was served on the official assignee and the messenger in possession, it was holden sufficient. *Doe d. Baring v. Roe, 6 Dowl.* 456. *Doe d. Chadwick v. Roe, 9 Dowl.* 492. *Doe d. Johnson v. Roe, 1. Dowl. N. C.* 493. Where however the declaration was served upon a person, appointed by the court of Chancery to manage the premises in question for an infant, there being no tenant in possession: the court held it to be insufficient; it was no more than serving a gentleman's bailiff, which would clearly be bad. *Goodtitle d. Roberts v. Badtittle, 1 B. & P.* 385.

Affidavit.] The form of the affidavit has been already given, *ante*, p. 156, where the service has been upon the tenant himself or upon his wife; and in other cases it may readily be framed, so as to bring it within some of the cases of service already mentioned. It must be entitled in the court and cause. Where it was intituled "John Doe on the demise of John Cousins against Richard Roe," when in fact the declaration was on several demises, it was holden insufficient. *Doe d. Cousins et al. v. Roe, 8 Law J., 69 ex. 7 Dowl.* 53. But where it was "John Doe on the several demises of" [he naming all the lessors], "against Richard Roe," it was deemed sufficient, although some of the demises were joint; *Doe d. Barles et al. v. Roe, 5 Dowl.* 447; and where the declaration was on the several demises of A. & B., an affidavit intituled "John Doe on the several demises of B. and A.," was deemed sufficient. *Doe v. Butcher, 2 Chit.* 174. So where the declaration was on the demises of A. and B. executors, of C. and D. assignees, and of E. and F., and the title of the affidavit did not describe them as executors or assignees, but named them merely, it was holden sufficient. *Doe d. Jenks et al. v. Roe, 2 Dowl.* 55. But "John Doe on the demise or demises of A. B. and C. D." would be bad. *Doe d. Neville v. Roe, 2 Dowl. N. C.* 330. Where the affidavit, instead of stating that the deponent had served the declaration by delivering it, stated that he had "delivered the declaration to the wife upon

the premises," Coleridge, J. held it to be sufficient; *Doe d. Jenkins v. Roe*, 5 Dowl. 155; but it is much safer to adhere to the regular form. See *ante*, p. 156. If the service have been upon several tenants, the affidavit must state the service upon each separately, otherwise it will be insufficient. *Doe d. Levi v. Roe*, 7 Dowl. 102. It may be made either by the person who actually served the declaration, or by any person who was present, and saw and heard what took place. *Goodtitle d. Wakein v. Badtitle*, 2 B. & P. 120. But see *Doe d. Hulme v. Roe*, 8 Law J., 16 cp. *semb. cont.*

Judgment against the casual ejector.] After the declaration has been served, and an affidavit made of the service, as already mentioned, the lessor of the plaintiff may move upon the affidavit for "judgment against the casual ejector." Where there are several tenants, if the service be regular upon some, but no sufficient service upon the others, the court will grant the rule only against those who have been regularly served, unless they be joint tenants. *Doe d. Sloe v. Roe*, 8 Dowl. 66. In the Queen's Bench and Common Pleas, if the service be regular, upon the tenant or his wife, counsel's signature is obtained to the motion paper, and it is then taken with the affidavit to the master's office, and the clerk there will draw up the rule; it is only in cases where there is something peculiar in the service, that it is necessary to make the motion in court. *Doe d. Welchen v. Roe*, 5 Dowl. 271. In the court of Exchequer, the motion is in all cases made in court. In the Queen's Bench and Exchequer, and now in the Common Pleas, it may be made at any time during the term, usually at the beginning of the term in town causes, or at the latter end in country causes. Formerly in the Common Pleas, in town causes, it must have been made within a week after the first day of Michaelmas or Easter term, or within four days after the first day of Hilary or Trinity term; *R. T. 32 C. 2*. But now, by R. C. P. 1 Vict. where the lands lie in London or Middlesex, this motion may be made on any day during the term. If the rule be not moved for in the same term in which the tenant, by notice at the foot of the declaration, is required to appear, he court in country causes, *Doe d. Graves v. Roe*, 4 Dowl. 88, 2 B., and in town causes also, *Doe d. Fell v. Roe*, 1 Dowl. N. 7. 777. Q. B. *Doe d. Wilson v. Roe*, 4 Dowl. 124, C. P. *Doe d. Walker v. Roe*, 1 Dowl. N. C. 613, Ex., will allow it to be moved for in the term next after that, but not in the third term; *Doe v. Roe*, 1 Dowl. 495. *Doe v. Roe*, 2 Tyr. 724. *Doe v. Roe*, 2 Dowl. 196. *Doe d. Thompson v. Roe*, 3 Dowl. 575. *Doe d. Twissden v. Roe*, 1 Har & W. 218. *Doe d. Barth v. Roe*, Bing. N. C. 675. In the Exchequer, *Right d. Jeffery v. Frong*, 3 Dowl. 348. *Doe d. Reeve v. Roe*, 1 Gal. 15, and Common Pleas, *Doe d. Wilson v. Roe*, 4 Dowl. 124, this rule in he second term is a rule to show cause only; in the Queen'

Bench, it is a rule absolute in the first instance. *Doe d. Croone v. Roe*, 6 Dowl. 270. If the rule be granted, draw it up; and if it be a rule to show cause only, serve it, and afterwards proceed to make it absolute, as in ordinary cases.

By the terms of the rule for judgment against the casual ejector, unless the tenant in possession appear and plead within a certain time therein specified, judgment shall be entered for the plaintiff, John Doe, against the defendant, Richard Roe, by default. It is not served upon the tenant, he having already sufficient notice by the service of the declaration; but still it must be drawn up, and must be taken away from the office within two days after the term in which it was moved, otherwise it shall not be drawn up or entered, nor shall any proceedings be had in such ejectment. *R. M. 31 G. 3, K. B.*; *R. E. 48 G. 3, C. P.* One rule is sufficient, although there be several tenants, *Doe v. Roe*, 2 Tyr. 724, whether the copy of the declaration served upon each tenant had his name alone prefixed to it, *Doe d. Burlton v. Roe*, 1 T. R. 477, or were addressed to all. *Doe d. Varley v. Roe*, 2 Dowl. N. C. 52. But if there be more actions than one, they cannot be treated as one; in such a case one consent rule alone for all, would be a nullity, and the lessor of the plaintiff might sign judgment against the casual ejector. *Doe d. Faithful v. Roe*, 7 Dowl. 718.

If the tenant have not entered an appearance, within the time mentioned by the rule, judgment against the casual ejector may be signed, in the Queen's Bench and Exchequer at the opening of the office in the morning, in the Common Pleas at the opening of the office in the afternoon, of the day next after the time given by the rule has expired. *For this purpose, make an incipitur on plain paper, and an incipitur on the roll, and take them together with your rule for judgment to the proper clerk at the master's office, who will thereupon sign judgment.* It is not necessary to enter an appearance for the casual ejector. *Doe d. Morgan v. Roe*, 2 Mees. & W. 423. *You may then sue out a writ of Habere facias possessionem, as directed hereafter, and deliver it to the sheriff to be executed.*

Appearance and Plea.

By the tenant in possession.] Formerly, in town causes, where the notice at the foot of the declaration required the tenant to appear on the first day of term, he had four days allowed him to appear and plead, after the rule for judgment had been drawn up and entered; but if the notice required him to appear generally of the term (which never occurred except by mistake), he had the whole of the term for that purpose. In country causes, the tenant was allowed four days after the term, to appear and plead. Formerly, also, if the declaration and

notice were served before Michaelmas or Easter term, he had until four days after the next issuable term allowed him : but afterwards, in the courts of Queen's Bench and Common Pleas, the time for the appearance was within four days after the end of such Michaelmas or Easter term, and not postponed until the fourth day after the end of Hilary or Trinity terms respectively following; *R. E. 2 G. 4, K. B. & C. P.*; in the Exchequer, however, it was still until four days after the issuable term. *R. H. 39 G. 3, ex.*

But by *R. G. H. 4 Vict.* it is ordered that "a party entitled to appear to a declaration in ejectment, may appear and plead thereto at any time after service of such declaration, and before the end of the fourth day after the term in which the tenant is required by the notice to appear; and may proceed to compel the plaintiff to reply thereto, or may sign judgment of nonpros, notwithstanding such plaintiff may not have obtained a rule for judgment on such service of declaration; and that a plaintiff, who may have omitted to obtain a rule for judgment within the time prescribed by the present rules and practice, shall be entitled, on production of such plea, to an order of a judge for leave to draw up a rule for judgment, as of the time at which such rule for judgment should have been obtained." If a nonpros, under this rule, be signed, before the lessor of the plaintiff has entered into the consent rule, the defendant will not be thereupon entitled to costs. *Doe v. Board, 12 Law J., 12 ex. 2 Dowl. N. C. 526.*

Within the time now mentioned, get a blank rule from the proper clerk at the master's office, fill it up, and sign it in the name of the defendant's attorney, leaving room above the signature for the plaintiff's attorney to sign it also; then enter an appearance for the tenant, as directed ante, vol. 1, p. 115, and the officer at the same time will mark the consent rule; next engross the general issue upon plain paper, tack the draft consent rule to the plea, and deliver them to the plaintiff's attorney or agent, as in other cases. R. Q. B. II. 1 Vict. The plaintiff's attorney, having separated the plea from the draft rule, will take the latter to the proper clerk at the master's office, and have the rule drawn up.

In the consent rule, the defendant shall specify for what premises he intends to defend; and shall consent to confess, upon the trial, not only lease, entry and ouster, but that the defendant (if he defend as tenant, or if he defend as landlord, that the tenant) was at the time of the service of the declaration in possession of such premises; and that if upon the trial the defendant shall not confess such possession, as well as lease, entry and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, no costs shall be allowed for not prosecuting the same, but the said defendant shall pay costs to the plaintiff in that case to be taxed. *R. M. 1 G. 4, K. B.*; *R. H. 1 & 2 G. 4, C. P.*

Exch. 9 *Price*, 299. And this rule extends to corporations, as well as to individuals. *Doe d. Farr v. Roe*, 1 *Ad. & El. N. C.* 700. The first part of this rule, unfortunately, is not attended to in practice; the consent rule, now, as formerly, usually stating that the party defends for "three messuages, three gardens," &c. enumerating the parcels exactly as in the declaration: whereas the real meaning of the rule was, that each tenant should specify the particular tenements for which he intends to defend; and it would be a great convenience if the rule were strictly complied with. See *Doe v. Hughes*, 4 *Dowl.* 412, 1 *Gale*, 263. Where the defendant shows that he is joint-tenant, tenant in common, or co-parcener with the lessor of the plaintiff, and denies actual ouster, the court on application will permit him to confess lease and entry alone, without also obliging him to confess ouster. *Doe d. Ginger v. Roe*, 2 *Taunt.* 397. But where the tenant applying, was not himself joint-tenant, &c. but merely held under a person who was, and he swore that he believed the ejectment would involve a question between joint-tenants, Patteson, J. refused to dispense with the confession of ouster, saying, that if the landlord choose to defend, he might, and he might then make this application. *Doe d. Wills v. Roe*, 1 *Har. & W.* 668. 4 *Dowl.* 628. Where one of four persons, who were served as tenants in possession, applied to have his name struck out of the appearance and consent rule, upon an affidavit that he was not in possession of any part of the premises: the court granted the application, upon his undertaking to permit execution to issue for any part of the premises of which he should be in possession. *Doe v. Snape*, 1 *Dowl.* 314. See *Doe v. Hughes, et al.*, 2 *Cr. M. & R.* 281.

After the tenant has thus made himself party to the record, the court will not set aside the appearance entered by him, upon the application of the lessor of the plaintiff, on the suggestion that he has no interest in the premises. *Doe v. Gee*, 9 *Dowl.* 612.

By Landlord, &c.] Where a tenant, having a landlord, is served with a declaration in ejectment by a stranger, he must give immediate notice of it to his landlord, otherwise he is liable to forfeit three years' improved rent of the premises. 11 *G. 2*, c. 19, s. 12. See *Crocker v. Fothergill*, 2 *B. & A.* 652. And it shall be lawful for the court, where such ejectment is brought, to suffer the landlord to make himself defendant. *Id.* s. 13, see *Doe v. Roe*, 2 *Crompt. & J.* 682. And the courts have allowed this, even after judgment and execution, where the tenant appeared to have colluded with the lessor of the plaintiff, *Doe d. Grocers' Company v. Roe*, 5 *Taunt.* 205, or where by mistake of the tenant the declaration had not been delivered to the landlord. *Doe d. Butler v. Roe*, 2 *Har. & W.* 131. See *Doe d. Thoughton v. Roe*, 4 *Burr.*

1996. But where a plaintiff had obtained judgment and possession in an undefended ejectment, without collusion, and had sold part of the premises and transferred the possession: the court refused to let the landlord in to defend. *Goodtitle v. Badtitle*, 4 Taunt. 820. And in a similar case, where there was no suggestion of collusion, and where it did not appear how the applicant was landlord, or when he became so, or whether he had ever received rent for the premises, the court refused to interfere after judgment and execution. *Doe d. Martin v. Roe*, 1 Hedg. 223. *Semb. S. C. nom. Doe. d. Thompson v. Roe*, 4 Dowl. 115. So a third person will not be allowed to defend as landlord, where it appears that the tenant in possession came in as tenant of the lessor of the plaintiff, even although the agreement under which he held has expired. *Doe v. Smythe*, 4 M. & S. 347. But where the landlord, without having himself made a defendant, defrayed the expense of defending an ejectment in the name of his tenant, and the tenant, who was an illiterate man, gave the plaintiff's attorney a retraxit of the plea and a cognovit, the court upon application set them aside, and let the landlord in to defend. *Doe v. Franklin*, 7 Taunt. 9, and see *Doe v. Dyer*, 3 Dowl. 696. And on the other hand, where the landlord was admitted to defend alone, and died pending the action, having devised all his real estates to B., the court upon application, (it appearing that the statute of limitations would prevent the lessor of the plaintiff from bringing a fresh ejectment), gave him leave to sign judgment against the casual ejector, and to issue execution thereon, unless B. would appear and defend the action as landlord. *Doe v. Grubb*, 5 B. & C. 457.

But although the statute in this respect names the landlord only, the courts are liberal in their construction of it, and will allow an heir to come in and defend, although he have never been in possession, *Doe d. Heblethwaite v. Roe*, 3 T. R. 783, n. at least if his ancestor were last seised; *per Ld. Kenyon*, 3 T. R. 783; or a remainderman, if the particular tenant were last seised; *per Ld. Kenyon*, *Id.*; or a devisee in trust, although he have never been in possession, unless the lessor of the plaintiff will consent to have the validity of the will tried in an issue of *devisavit vel non*; *Love-leck v. Doncaster*, 4 T. R. 123. see 3 T. R. 783; or a mortgagee to defend, with the mortgagor, *Doe v. Cooper*, 8 T. R. 645, but not by himself. *Semb. Id.*

The rule in this case allows the landlord to defend with the tenant, if the latter appear; or if he do not, then that the landlord may appear and defend alone, upon entering into the usual consent rule; and the plaintiff may in the mean time sign judgment against the casual ejector, but execution thereon shall be stayed until the court shall make further order upon the subject. See *Arch. Forms*, 377, 378. *Doe v. Bennett*, 4 B & C. 897. Where there were four actions, all upon the same

demises, but against different sets of tenants, and upon the landlord's appearing he entered into but one rule as to the four, treating the whole as one action: the court held his consent rule to be a nullity, and that the lessor of the plaintiff had a right to sign judgment against the casual ejector. *Doe d. Faithful v. Roe*, 7 Dowl. 718.

Where a landlord is thus let in to defend, he will not be allowed at the trial to object that the occupiers have not received notice to quit from the lessor of the plaintiff. *Doe v. Creed*, 5 Bing. 327. And on the other hand, he cannot avail himself of any defence, which the tenant would have been precluded from setting up. *Doe v. Birchmore et al.*, 8 Law J., 108, *qb*.

Issue, &c.

If the tenant or landlord, or both, appear and plead, then after the plaintiff's attorney has got the consent rule drawn up, as directed *ante*, p. 165, he may proceed to make up the issue, give notice of trial, sue out jury process, pass the record, and set down the cause for trial, as in ordinary cases. In what cases the proceedings in an ejectment by mortgagee may be stayed, by payment of the mortgage money, interest and costs: See *vol. 1*, p. 263.

Trial, execution, &c.

Nonsuit.] If the defendant appear and confess lease, entry, ouster and possession, according to the terms of the consent rule, the trial proceeds, as in other cases. But if it be intimated to the associate that the defendant will not appear, he will order the crier to call him, and the defendant is then accordingly called three times to come forth and confess lease, entry, and ouster; and if he do not appear, the plaintiff is then called and nonsuit, and the associate makes a memorandum on the record, that he is nonsuit by reason of the defendant's not appearing to confess lease, entry and ouster. And the same if the defendant appear, but refuse to confess lease, entry or ouster. See *Doe v. Armfield*, 1 Dowl. N. C. 327. The lessor of the plaintiff is thereupon, according to the terms of the consent rule, entitled to have judgment against the casual ejector, upon which he may sue out a writ of possession; see *Doe d. Davies v. Roe*, 1 B. & C. 118; and by the consent rule, he is also entitled to his costs from the defendant, which upon production of the *postea* he may have taxed upon the consent rule, and having served the rule and demanded the costs, as directed *post*, *tit. "Attachment,"* he may enforce payment by attachment.

But if the plaintiff be nonsuit upon the merits, the defendant will be entitled to costs. In form, the judgment requires

these costs to be paid by John Doe, the nominal plaintiff; but in reality they are payable by the lessor of the plaintiff, under the consent rule, and they are taxed, demanded, and the payment enforced by attachment, as above, *Doe v. Saller*, 3 *Taunt.* 185, without previously issuing any writ of execution against the nominal plaintiff, as was formerly the practice. See *Doe v. Barker*, 2 *Cr. & M.* 234. Or instead of suing out an attachment, the defendant may proceed to obtain a rule, ordering the lessor of the plaintiff to pay these costs; after which he may sue out execution on the rule, in pursuance of stat. 1 & 2 *Vict. c.* 110, s. 18, as described hereafter. *Doe v. Bradley*, 1 *Dowl. N. C.* 259. Where the lessor of the plaintiff died between the commission day and the trial, and the plaintiff was nonsuit on the merits, it was holden that the executor of the lessor was not liable for the costs of the action. *Doe v. Grundy*, 1 *B. & C.* 284. and see *Doe v. Ford*, 2 *Smith*, 407.

Verdict.] If the plaintiff have a verdict, he shall have judgment to recover his term against the defendant, with nominal damages and costs; and having got his costs taxed upon the verdict, as in ordinary cases, he may sue out execution. *Vide supra.* It may be necessary to mention also, that upon a declaration stating a demise of an entirety, the plaintiff may recover an undivided moiety, or the like. *Doe v. Whipple*, 1 *Exp.* 360. As to the costs, also, if the tenant, although nominally defendant, be not the person who has really defended the action, the court by rule will oblige the party, at whose expense it was defended, to pay the costs of the lessor of the plaintiff, which payment the latter may then enforce by attachment. Thus where the landlord defended an action of ejectment in the name of his tenant, who was a pauper, and the plaintiff had a verdict, the court upon application made the landlord pay the costs of the action. *Thrustout v. Shenton*, 1 *B. & C.* 110. So, where parish officers defended an ejectment in the name of a pauper whom they had put into possession, the court obliged them to pay the costs. *Doe v. Gray*, 1 *B. & C.* 615. But if the defendant obtain a verdict, although in form he has judgment for his costs against the nominal plaintiff John Doe, yet in reality they are recoverable from the lessor of the plaintiff, under the consent rule, in the same manner as upon a nonsuit. Formerly, upon a verdict for the defendant, or a nonsuit upon the merits, a *ca. sa.* was usually sued out against the nominal plaintiff, John Doe, for the amount of the defendant's costs, and returned *non est in status*, before the defendant proceeded for his costs upon the consent rule; but this useless piece of practice has very properly been disused, and is now holden not to be necessary. *See v. Fry*, 2 *Dowl.* 265.

If there be several issues, some found for the plaintiff, some
VOL. II.

for the defendant, the defendant shall have the costs of those issues which are found for him. *Ante*, p. 58, 60. Even where the declaration consisted of one count only, and the property sought to be recovered and mentioned in the declaration, consisted of three messuages, as to two of which the jury found the defendant guilty, and not guilty as to the residue, it was holden that the defendant was entitled to his costs, as far as related to the messuage which the plaintiff failed to recover. *Doe v. Errington*, 4 Dowl. 602. And the same, where there are several defendants. See *Doe v. Hughes*, 4 Dowl. 412, 1 Gale, 263. and see *ante*, p. 57.

Certificate for immediate execution.] By stat. 11 G. 4, & 1 W. 4, c. 70, s. 38, "in all trials of ejectment at *nisi prius*, where a verdict shall be given for the plaintiff, or the plaintiff shall be nonsuited for want of the defendant's appearance to confess lease, entry, or ouster, it shall be lawful for the judge before whom the cause shall be tried, to certify his opinion upon the back of the record, that a writ of possession ought to issue immediately, and upon such certificate a writ of possession may be issued forthwith; and the costs may be taxed, and judgment signed and executed afterwards at the usual time, as if no such writ had issued: provided that such writ, instead of reciting a recovery by judgment, in the form now in use, shall recite shortly that the cause came on for trial at *nisi prius* at such a time and place, and before such a judge (naming the time, place, and judge), and that thereupon the said judge certified his opinion that a writ of possession ought to issue immediately." Although the certificate, in form, is, that a writ of possession ought to issue immediately, yet the judge may therein order that it shall not be acted upon for a certain time. *Doe v. Hilliard*, 5 Car. & P. 132. Prior to this statute, where a plaintiff was nonsuit for the defendant's not confessing lease, entry, and ouster, if the action were in the Common Pleas he might sign judgment and sue out execution immediately; 2 T. R. 780, n.; but in the court of King's Bench, not until after the fourth day of the term. *Doe v. Copeland*, 2 T. R. 779, or at least not until the first day of term; see *Doe d. Davies v. Roe*, 1 B. & C. 118; and the practice in the Exchequer was the same in this respect as in the King's Bench. But this practice of the Common Pleas seems to be altered by the above statute; and now the plaintiff in such a case shall not have his writ of possession in any of the courts, until the day in bank, or the first day of term where the cause has been tried in the vacation, unless he obtain the certificate above mentioned.

Execution.] Get a blank writ of possession at the stationer's, upon one or more demises, according to the number of demises

upon which you have recovered; see the Forms, Arch. Forms, 386, 387; fill it up; it need not be signed; but take it, together with the judgment paper or *postea*, to the office of the sealer of the writs, and upon your producing the judgment paper or *postea*, the clerk there will seal the writ. See R. G. H. 2 W. 4, s. 75. A *præcipe* is not required. *Id.* s. 76. If the writ issue after a certificate for speedy execution, it must be in the form directed by stat. 11 G. 4 & 1 W. 4, c. 70, s. 38, above mentioned. Obtain a warrant upon the writ at the sheriff's office, and give it to the officer; let some person who is acquainted with the premises accompany him, and he will give possession either to the lessor of the plaintiff, or to any person attending on his behalf. Where in ejectment for five-eighths of a cottage, the sheriff gave possession of the whole, the court held that the tenant should be restored to the possession of three-eighths. *Roe v. Dawson*, 3 Wils. 49. After possession has once been given, the lessor of the plaintiff cannot have another writ of possession for the same premises, even before the sheriff has returned the former writ, although he have been disturbed in the possession by the same defendant. *Doe d. Pate v. Roe*, 1 Taunt. 55. And where a sheriff's officer after he had taken possession of premises under such a writ, and before he could deliver them up to the lessor of the plaintiff, was turned out of possession, Taunton, J. refused to allow a new writ of possession to be issued, as there was no evidence to connect the defendant with the act complained of. *Doe v. Mirehouse*, 2 Dowl. 200. In such cases, however, it is probable the court upon application would punish the offenders by attachment.

As to costs, if the plaintiff obtain a verdict, he may have execution for them by writ of *feri facias*, or *ca. xi.* See Arch. Forms, 388.

If after a writ of possession has been executed, it be set aside upon motion, the defendant cannot have a writ of restitution so long as the judgment is allowed to stand; but the court may order the possession to be restored to the defendant by a rule of court. *Doe v. Lord*, 6 Dowl. 256.

SECTION III.

Ejectment where the possession is vacant.

Where the house or land sought to be recovered is deserted, and the tenant cannot be found, in order to serve him with a declaration in ejectment, the proceedings in that case are in manner following:—

First, prepare a lease of the premises on stamped paper, from

the party claiming, to some friend or other person (not being an attorney, R. M. 1654, s. 1, K. B. & C. P.) for any short term, at a peppercorn rent; see the form, in the Appendix; which must be afterwards executed upon the premises, either by the claimant himself, or by some agent authorised by him for that purpose by power of attorney; see the form of the power of attorney, in the Appendix. Secondly, get a blank form of declaration on a single demise, and fill it up, inserting the name of the real lessee, instead of John Doe, and the name of some third person as the ejector; and at the foot of it, write a notice to appear, addressed to the ejector, thus:—"Mr. ——. Take notice that unless you appear within the first four days of the next —— term, in Her Majesty's court of —— at Westminster, at the suit of the above-named plaintiff ——, and plead to his declaration in ejectment, judgment will thereupon be entered against you by default. Your's, &c. A. B., plaintiff's attorney."

Then, upon some day before the first day of term, let the claimant (or such agent as he may have deputed for the purpose by power of attorney, as above mentioned), the lessee, and the ejector, accompanied by the claimant's attorney or his clerk, go to the premises. The claimant or his agent then enters upon the premises, and takes possession of them: if land, he enters upon any part of it; if a house, he usually stands upon the threshold of the front door, putting his finger into the key hole if there be one. See *Doe d. Frith v. Roe*, 2 Dowl. 431. Whilst so in possession, he executes the lease to the lessee, who then executes it also; and the lessee then enters upon the premises and takes possession in a similar way. The ejector then enters and puts the lessee out of possession; whereupon the attorney immediately serves him with the declaration and notice.

On or after the first day of the next term, enter a rule to plead with the proper clerk at the master's office, which however is not to be served: and at the expiration of this rule, as the ejector of course never pleads, and no other person will be admitted to defend in his stead, you may sign judgment, as directed ante, p. 164, and sue out execution.

SECTION IV.

Ejectment by landlord against tenant, for a forfeiture.

Where by the lease or agreement between landlord and tenant, a power of re-entry is reserved to the landlord, in case the tenant shall be guilty of any breach of covenant, &c., it is not necessary that the landlord should actually enter upon the premises before he seeks to recover the possession of them by

t, but the entry confessed in the ejectment will be. *Little v. Heaton*, 2 *Ld. Raym.* 750. *Oates v. Bryer*, 1896, 1897.

case of forfeiture for non-payment of rent, where there is no distress upon the premises, great particularity of mode must be observed in the time and manner in which the rent is demanded, to enable the landlord to maintain the action. See 1 *Saund.* 287, n. 16. But where there is no distress upon the demised premises, then, by stat. 4 G. 2, s. 2, "in all cases between landlord and tenant, as it shall happen that one half year's rent shall be in arrear due to the landlord or lessor, to whom the same is due, it shall be lawful by law to re-enter for the non-payment thereof, the landlord or lessor shall and may, without any formal entry or re-entry, serve a declaration in ejectment for the recovery of the demised premises; or in case the same cannot be served, or no tenant be in actual possession of the premises, then to affix the same upon the door of any demised premises, or in case such ejectment shall not be for the recovery of a messuage, then upon some notorious place of the premises or hereditaments comprised in such declaration in ejectment, and such affixing shall be deemed legal service, which service or affixing such declaration in ejectment shall stand in the place and stead of a demand and return in case of judgment against the casual ejector, or for non-confessing lease, entry or ouster, it shall be lawful for the court where the said suit is depending by writ or be proved upon the trial, that half a year's rent shall be paid before the said declaration was served, and that no distress was to be found on the demised premises, paying the arrears then due; and that the lessor or lessors in ejectment had power to re-enter; then and in every case the lessor or lessors in ejectment shall recover judgment and execution, in the same manner as if the rent had been lawfully demanded, and a re-entry made. And in case the defendant is an assignee, or other person claiming or deriving under the said lease, shall suffer judgment to be recovered on such writ, and execution to be executed thereon, without payment and arrears, together with full costs, and without any bill for relief in equity within six calendar months after the execution executed; then and in such case the said assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all remedy in law or equity, other than by writ of error reversal of such judgment in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth have the said demised premises discharged from such lease. *Id.* sect. 4, if the lessee, or his assignee, &c., shall at any

time before the trial, pay or tender to the landlord or lessor, his executors, &c., or shall pay into court, all the rent in arrear, together with costs, all further proceedings shall cease. *See ante*, vol. 1, p. 263.

The reader will perceive that the proceedings under this statute, are the same as in ordinary cases; except that if the possession be vacant the declaration is to be affixed to the door of the demised house, or in the case of land, upon some notorious place of it, and that such affixing shall be deemed legal service; *supra*; and the court in such a case will require to be well satisfied that the tenant cannot be found, so as to be legally served, before they will allow such affixing of the declaration to be deemed good service. *See Doe d. Pugh v. Roe*, 1 *Hodg.* 6. Also, the affidavit, in moving for judgment against the casual ejector, must state not only the service of the declaration, but also that at least half a year's rent was due at the time of the service, and that no sufficient distress was to be found upon the premises countervailing the arrears [that is to say, half a year's rent, *Doe d. Powell v. Roe*, 9 *Dowl.* 549.] then due; *supra*, and see the *Appendix*; and the affidavit in this respect must be positive, and not merely to the belief of the deponent or the like. *Doe v. Roe*, 2 *Dowl.* 413. *Doe d. Hicks v. Roe*, 1 *Dowl. N. C.* 180. It is not necessary that the landlord himself should swear to the amount of the rent due; it may be sworn to by his receiver or agent. *Doe d. Charles v. Roe*, 2 *Dowl.* 752.

Also, by stat. 11 G. 4 & 1 W. 4, c. 70, s. 36, where the right of entry accrues to the landlord, or where the tenancy expires, in or after Hilary or Trinity terms, he may, "at any time within ten days after such tenancy shall expire, or right of entry accrue, serve a declaration in ejectment, intituled of the day next after the day of the demise in such declaration, whether the same shall be in term or in vacation, with a notice thereunto subscribed, requiring the tenant in possession to appear and plead thereto within ten days; and proceedings shall be had on such declaration, and rules to plead entered and given, in the same manner, as nearly as may be, as if such declaration had been duly served before the preceding term: provided always that no judgment shall be signed against the casual ejector, until default of appearance and plea within such ten days; and that at least six clear days' notice of trial shall be given to the defendant before the commission day of the assizes at which such ejectment is intended to be tried: provided also, that any defendant in such action, may, at any time before the trial thereof, apply to a judge of either of Her Majesty's superior courts at Westminster, by summons in the usual manner, for time to plead, or for staying or setting aside the proceedings, or for postponing the trial until the next

s, and that it should be lawful for the judge in his discretion to make such order in the said cause as to him shall expedient." 11 G. 4 & 1 W. 4, c. 70, s. 36. This extends only to country ejectments. *Doe d. Norris v. Roe*, 11. 547. If the six days' notice of trial here required be given, the defendant will waive the objection by appearing to trial and defending the action. *Doe v. Jessop*, 3 B. & 02.

A defendant, if he wishes for particulars of the breaches of contract for which the action is brought, may obtain a judge's order for them upon summons; which will have the effect of staying the proceedings in the action, until such particulars shall be delivered. *Doe v. Phillips*, 6 T. R. 597.

SECTION V.

Tenant for holding over, after the determination of the tenancy.

Where a tenant holds over, after his tenancy is determined by effluxion of time or by a notice to quit, the landlord recovers possession of the premises from him by ejectment, in ordinary cases and as already detailed, *ante*, p. 148, &c. If the holding were under a lease or agreement in writing, for a term or number of years certain, or from year to year, and a demand in writing of the possession have been made, in accordance with the following statute he may think fit, and engraft upon his proceedings. An agreement in writing as to covenants for three months certain is within the Act: *Doe d. Pugh v. Roe*, 5 B. & A. 766; but a holding from year to year without any lease or agreement in writing, is not; *Doe d. Bradford v. Roe*, 5 B. & A. 770; nor does the Act extend to the case of a term for fourteen years determinable at the end of seven by notice, where the tenant holds over, after notice determining the tenancy; *Doe d. Cardigan v. Roe*, 10 B. & R. 540; nor to a holding over, after a term has been determined; *Doe d. Tindal v. Roe*, 1 Dowl. 143; nor to the case of a tenant for term of years, who has been allowed to remain in possession for more than a year after his term expires, for then a new tenancy from year to year has been created; *Doe d. Field*, 2 Dowl. 542; nor to the case of a tenant holding premises from quarter to quarter, on the terms of continuing possession at the end of any three calendar months, receiving notice in writing, and, in the event of losing such licence, of quitting when requested by his landlord,

and without notice. *Doe d. Carter et al. v. Roe*, 12 *Law J.*, 27, *ex.* But it extends to an underlessee holding over, and his lessor may proceed against him under this statute; *Doe d. Watts v. Roe*, 5 *Dowl.* 213; so, a tenant in common, suing in ejectment for his undivided moiety, may proceed under this statute. *Doe v. Rotheram*, 3 *Dowl.* 690, 1 *Gale*, 157.

Demand, declaration.] By stat. 1 G. 4, c. 87, s. 1, "where the term or interest of any tenant, now or hereafter holding, under a lease or agreement in writing, any lands, tenements or hereditaments, for any term or number of years certain, or from year to year, shall have expired, or been determined either by the landlord or tenant by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing, made and signed by the landlord or his agent, and served personally upon, or left at the dwelling house or usual place of abode of, such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the declaration, to address a notice to such tenant or person, requiring him to appear in the court in which the action shall have been commenced on the first day of the term then next following, [see *Doe v. Rushworth*, 6 *Dowl.* 712,] or if the action shall be brought in the counties palatine of Lancaster or Durham respectively, then on the first day of the next session or assizes, or at the court day or other usual period for appearance to process then next following, as the case may be, there to be made defendant, and to find such bail, if ordered by the court, and for such purposes, as are hereinafter next specified."

The notice at the foot of the declaration, here mentioned, is in practice usually added after the ordinary notice by the casual ejector, and is signed in the name of the landlord, see *Anon.* 1 *D. & R.* 435, *n.*, or by some person as agent for him; but where it was signed by a person as agent for the "plaintiff," it was holden sufficient; *Doe d. Beard v. Roe*, 1 *Mees. & W.* 360; or if signed in a wrong name, it will be no objection to the landlord obtaining judgment against the casual ejector. *Goodtitle d. Duke of Norfolk v. Notille*, 5 *B. & A.* 849. It may be in the following form:—

Mr. Joseph Styles [the tenant].

Take notice that you are hereby required to appear in Her Majesty's court of — at Westminster, on the first day of next — term, then and there to be made defendant in this action of ejectment, and then and there to enter into a recognizance by yourself and two sufficient sureties, in such sum as to the said

must shall seem reasonable, conditioned to pay the costs and damages which shall be recovered in this action, if the court shall so order.

Your's, &c.
John Nokes [the landlord].

As to the filing of the declaration, where the tenancy has expired in or after Hilary or Trinity term, and the proceedings thereon, see *ante*, p. 174.

Bail, &c.] "And upon the appearance of the party at the day prescribed, or, in case of non-appearance, on making the usual affidavit of service of the declaration and notice, it shall be lawful for the landlord (producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit [*see Doe v. Boast, 7 Dougl. 37*], as the case may be, and that possession has been lawfully demanded in manner aforesaid), to move the court for a rule or such tenant or person to show cause, within a time to be fixed by the court, on a consideration of the situation of the premises, why such tenant or person, upon being admitted defendant, besides entering into the common rule and giving the common undertaking, should not undertake, in case a verdict shall pass for the plaintiff, to give the plaintiff a judgment, to be entered up against the real defendant, of the term next preceding the time of trial, or if the action shall be brought in the counties palatine respectively, then of the session, assizes or court day (as the case may be), at which the trial shall be had, and also why he should not enter into a cognizance by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the plaintiff in the action; and it shall be lawful for the court, upon cause shown, or upon affidavit of service of the rule, in case no cause shall be shown, to make the same absolute in the whole or in part, and to order such tenant or person, within a time to be fixed upon a consideration of all the circumstances, to give such undertakings and find such bail, with such conditions and in such manner shall be specified in the said rule, or such part of the same made absolute; and in case the party shall neglect or refuse to do, and shall lay no ground to induce the court to enlarge the time for obeying the same, then, upon affidavit of service of such order, an absolute rule shall be made for entering up judgment for the plaintiff." 1 G. 4, c. 87, s. 1. The cognizance is to be taken and filed, in the same manner as in ordinary cases; but no action or other proceeding shall

be commenced upon it, after six months from the delivery of the premises or any part of them to the landlord. *Id.* s. 4. See *Doe v. Moore*, 6 Bing. 656. In the court of King's Bench, Taunton, J. allowed it to be made part of the rule nisi, that the plaintiff should be at liberty to sign judgment against the casual ejector, if the tenant should make default in entering into the required recognizance; and it was said, upon that occasion, that such was the practice of the court. *Doe v. Roe*, 2 Dowl. 180. The amount for which the security is to be given, however, is not specified in the rule nisi, but is fixed by the court on making the rule absolute. See *Doe d. Phillips v. Roe*, 5 B. & A. 766. Nor is there any necessity that the attesting witness to the lease or agreement should make an affidavit of its execution. *Doe v. Rotherham*, 1 Gale, 157, 3 Dowl. 690. *Doe d. Gowland v. Roe*, 6 Dowl. 35. The lease or agreement itself, or a counterpart or duplicate of it, must be produced, upon drawing up the rule nisi; a copy will not be sufficient: and it must at that time be duly stamped; it will not be sufficient to have it stamped at the time of showing cause against the rule. *Doe d. Caulfield v. Roe*, 3 Bing. N. C. 329. See *Doe v. Roe*, 1 D. & R. 433, *cont.* The affidavit on which the motion is made, must be so intitled as to state the names of all the lessors of the plaintiff at length; it will not be sufficient to say "John Doe on the several demises of J. S. and others," or the like. *Doe d. Pryme et al. v. Roe*, 8 Dowl. 340.

Trial, &c.] "Wherever hereafter it shall appear on the trial of any ejectment at the suit of a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial, the plaintiff shall not be nonsuited for default of the defendant's appearance to confess lease, entry and ouster, but the production of the consent rule and undertaking of the defendant shall, in all such cases, be sufficient evidence of lease, entry and ouster; and the judge, before whom the cause shall come on to be tried, shall, whether the defendant shall appear upon such trial or not, permit the plaintiff, on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits thereof, which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial, finding for the plaintiff, shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits: provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing an

action of trespass for the mesne profits which shall accrue, from the verdict or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment." 1 G. 4, c. 87, s. 2. "It is only in case of the defendant not appearing at the trial, that it is necessary to prove that notice of trial was given to him, in order to recover the mesne profits; if he appear, no such proof of notice is necessary." *Doe v. Hodgson*, 12 Ad. & El. 135.

But "in all cases wherein the landlord shall elect to proceed in ejectment under the provisions hereinbefore contained, and the tenant shall have found bail, as ordered by the court, then, if the landlord upon the trial of the cause shall be nonsuited, or a verdict pass against him upon the merits of the case, there shall be judgment against him, with double costs." *Id.* s. 6.

[Execution.] "In all cases in which such undertaking shall have been given and security found as aforesaid, if upon the trial a verdict shall pass for the plaintiff, but it shall appear to the judge before whom the same shall have been had, that the finding of the jury was contrary to the evidence, or that the damages given were excessive, it shall be lawful for the judge to order the execution of the judgment to be stayed absolutely till the fifth day of the term then next following, or till the next session, assizes or court day, as the case may be; which order the judge shall in all other cases make upon the requisition of the defendant, in case he shall forthwith undertake to find, and on condition that within four days from the day of trial he shall actually find, security, by the recognizance of himself and two sufficient sureties, in such reasonable sum as the judge shall direct, conditioned not to commit any waste or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure produced or made (if any) upon the premises, and which may happen to be thereupon from the day on which the verdict shall have been given, to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be." 1 G. 4, c. 87, s. 3. Where several crops were on the land, at the time it was taken in execution under a writ of possession, in an ejectment against a tenant for holding over, the court refused a rule to oblige the lessors of the plaintiff to pay over the value of the crops to the defendant, after deducting the amount of the rent due. *Doe v. Witherwick*, 3 Bing. 11.

As to a certificate for immediate execution, see *ante*, p. 170.

SECTION VI.

Action of trespass for mesne profits.

After the lessor of plaintiff in ejectment obtains judgment, he may bring an action of trespass for mesne profits, to recover, not only the value of the land, &c. during the time the tenant or occupier may have wrongfully holden it, but also the reasonable costs of the ejectment as between attorney and client, where the judgment has been by default against the casual ejector; *Doe v. Huddart*, 4 Dowl. 437; and where the plaintiff incurred costs in error, in revising a judgment in ejectment obtained by the defendant, it was holden that he might recover these costs also, by way of damages, in an action of trespass for mesne profits. *Nowell v. Roake*, 7 B. & C. 404.

The action may be brought, either in the name of the nominal plaintiff in the ejectment, *Askin v. Parkin*, 2 Burr. 665, *Doe v. Davis*, 1 Esp. 358, or by the lessor of the plaintiff; see *Chamier v. Ltingon*, 2 Chit. 410; in the former case, however, only the meane profits accruing since the date of the demise in the declaration, can be recovered. In either case, the judgment in the ejectment will be evidence, although not conclusive, *Doe v. Huddart*, 4 Dowl. 437, 1 Gale, 260, of the title of the plaintiff at the time of the demise laid in the declaration, and since; if the party wish to recover mesne profits for a period anterior to that, he must bring the action in his own name, and prove his title *aliunde*.

The proceedings in the action, are in other respects the same as in ordinary cases in non-bailable actions.

CHAPTER II.

*Replevin.*1. *The replevin, and replevin bond.*

Bond.] In order to prevent vexatious replevins of distresses for rent, it is enacted by stat. 11 G. 2, c. 19, s. 23, that sheriffs and other officers granting replevins, shall take from the plaintiff and two responsible persons as sureties, a bond in double the value of the goods distrained (to be ascertained by oath) conditioned for prosecuting the suit with effect and without delay, and for a return of the goods; and the sheriff is authorised to assign the bond to the avowant or person

ng cognizance; and if the bond be forfeited, the avowant bring an action upon it in his own name, and the court by rule give relief to the parties, &c. *See Short v. Hub-*
2 Bing. 350. And see the form of the bond, Arch. Forms,

See as to the effect of taking a bond with one surety, *Austin v. Howard, 7 Taunt. 327.* In other cases the iff is bound to take pledges for prosecuting with effect, and return, if a return should be adjudged; *stat. Westm. 2, Ed. 1.) c. 2*; but in practice he takes a bond in all cases. sheriff, however, is not liable to an attachment for neg-
 ing to take a bond, or for taking one with insufficient ties; *R. v. Lewis, 2 T. R. 617*; the only remedy against is, by action on the case. *See 1 Saund. 195 b.*

or the purpose of taking replevin bonds, the sheriff of every ty must appoint four deputies at least, dwelling at not e than 12 miles distant from each other. *1 & 2 Ph. & M. 2.* And in taking replevin bonds, these deputies, or (as are usually called) replevin clerks, must previously make er enquiries as to the sufficiency of the sureties; and ill not be sufficient that he make those enquiries from the ties themselves. *Jeffery v. Bastard, 6 Nev. & M. 303, 2 . & W. 60. And see Scott v. Waithman, 3 Stark. 168.* He ot indeed bound to warrant their sufficiency; but he is ad to see that they are at least apparently responsible. *He v. Blades, 5 Taunt. 225.*

he take no bond, or a bond from sureties who are insuffi-
 t, or, rather, not apparently sufficient, at the time, the iff will be liable to an action on the case, *1 Saund. 195 b. see Tesseymen v. Gildart, 1 New Rep. 292. Richards v. n, 2 W. Bl. 1220,* at the suit of the avowant or person ing cognizance, if he recover; *see Page v. Eamer, 1 B. & P.* ; and this, without getting a return of *elongata* to the writ *elorno abendo*, and indeed without even suing out that ; *Perreau v. Bevan, 5 B. & C. 284*; *see Hucker v. Gordon, . & M. 58*; in which action the plaintiff may recover to the at of the penalty of the bond, if the sheriff have taken one, v. *Goodluck, 2 Bing. N. C. 220, 1 Hodg. 370. Yea v. bridge, 4 T. R. 433. Evans v. Brander, 2 H. Bl. 547. Baker v. Garrett, 3 Bing. 36. Concanen v. Lethbridge, Bl. 36,* or to double the value of the goods, if he have not.

e Replevin.] The mode of replevying goods is thus :
 ing obtained the consent of two responsible housekeepers to in the replevin bond, give their names to the officer whom ntend to employ; and after satisfying himself as to the re-
 ability of the sureties, he will give you a certificate to that . Take this to the office of the under-sheriff or replevin , who will immediately prepare the replevin bond, and if arty and sureties be in attendance, it may then be ex-

eruted; a precept to replevy the goods, directed to your officer, will then be given to you, and your officer will thereupon replevy them. Vide supra.

Bond, how forfeited, &c.] The bond is conditioned for prosecuting the replevin suit with effect and without delay, and for a return of the goods, if such return should be adjudged. And the words "with effect," mean "with success." *Perreau v. Bevan*, 5 B. & C. 284, 8 D. & R. 72. If therefore the plaintiff be guilty of delay in prosecuting his suit in the county court, *Dias v. Freeman*, 5 T. R. 195. See *Seal v. Phillips*, 3 Price, 17, or in the court above, if the suit be removed there, *Guillim v. Hoolbrook*, 1 B. & P. 410. *Harrison v. Wardle*, 2 Nev. & M. 703, 5 B. & Ad. 146, or although he prosecute it without delay, yet if he do not prosecute it with effect, as if he be nonsuit, *Turnor v. Turnor*, 2 Brod. & B. 107. *Waterman v. Yea*, 2 Wils. 41. *Perreau v. Bevan*, supra, or there be a verdict against him: the bond is thereby forfeited, and the defendant or the sheriff may put it in suit. And the sureties will not be discharged, by the defendant's giving time to the plaintiff, *Moore v. Bowmaker*, 6 Taunt. 379, particularly if the time were given after a breach of the condition of the bond; *Hallett v. Mountstephen*, 2 D. & R. 343; but it seems that the sureties will be discharged, if the parties refer the cause to an arbitrator, without their assent. *Archer v. Hale*, 4 Bing. 464. See *Moore v. Bowmaker*, 7 Taunt. 97, *semb. cont.* They are not discharged, however, by the defendant electing to proceed under stat. 17 C. 2, c. 7, and executing a writ of enquiry, &c., if he do not thereby obtain the amount of his rent, &c. *Turnor v. Turnor*, supra.

If one who is surety in a replevin bond, be afterwards required as a witness, the court upon application will allow another to be substituted for him. *Bailey v. Bailey*, 1 Bing. 92.

Remedy on it.] If the bond become forfeited, as above mentioned, the sheriff may immediately sue upon it. Or he may assign it to the defendant, 11 G. 2, c. 19, s. 23. See *Austin v. Howard*, 7 Taunt. 327. *Thompson v. Parden et al.* 1 M. & Gr. 535, who may then sue upon it in his own name, in the same manner as upon a bail bond; and this is the more usual course, where the sureties are responsible persons. Where there is an avowant, and also a person making cognizance, the bond may be assigned to both, and they may jointly sue upon it, *Phillips v. Price*, 3 M. & S. 180, or it may be assigned to the avowant only; *Archer v. Dudley*, 1 B. & P. 381, n; or if there be no avowant, the bond may be assigned to the party making cognizance, and he may sue upon it. And the sheriff or the defendant will not be precluded from bringing an action upon it, by the defendant having elected to proceed

under stat. 17 C. 2, c. 7, as hereinafter mentioned. *Perreau v. Bevan*, 5 B. & C. 284, 8 D. & R. 72. *Turnor v. Turner*, 2 Brod. & B. 107. The action may be brought in any of the courts at Westminster, although the replevin suit have not been removed from the county court; *Dias v. Freeman*, 5 T. R. 195; or if removed, it is not required that the action on the bond should be brought in the same court. *Wilson et al. v. Hartley*, 7 Dowl. 461. And the sureties will be liable in such action for the amount of the value of the goods, if that be less than the rent, or otherwise for the amount of the rent, together with the costs in the replevin suit (not exceeding in all the penalty of the bond), and the costs in the action against them; and on payment of that sum, the court will stay the proceedings against them. *Hunt v. Round*, 2 Dowl. 558. *Gingell v. Turnbull*, 3 Bing. N. C. 881. And both sureties are together only liable to this extent. *Hefford v. Alger*, 1 Taunt. 218. Indeed several actions will not be allowed to be brought against the sureties, without very sufficient reasons for doing so; or if brought, the court will stay the proceedings, upon the payment of the sum recoverable, and the costs of one action. *Bartlett v. Bartlett*, 11 Law J. 223 cp. See *Key v. Hill*, 2 B. & A. 598.

2. Proceedings in the county court.

By the terms of the replevin bond, the plaintiff is bound to appear at the next county court, and prosecute his suit with effect and without delay. He or his attorney must accordingly attend there, and levy his plaint, by lodging the same at the office of the under-sheriff. The plaint is in the usual form of a declaration or plaint in the county court, thus: "——— to wit, *Joseph Styles complains of John Nokes, in a plea of taking the [cattle] goods and chattels, to wit, [here enumerating them] of the said Joseph Styles, and unjustly detaining the same against gages and pledges, &c.*" Then add "*Pledges to prosecute, John Doe, Richard Roe.*"

Upon this the defendant is summoned; and if he appear, the plaintiff declares, the defendant avows or makes cognizance, and the parties proceed to issue, and trial, in very much the same way as in the superior court. But in practice it is usual to remove the plaint as soon as it is levied, and before any other proceedings are taken upon it.

3. Proceedings in the court above.

Removal of the Cause.] The cause is removed by writ of *recordari facias loquelam*, sued out with the cursitor upon a *præcipe* (see the *Form, Appendix*), returnable in one of the

courts at Westminster in term time. *See the form of the writ, Appendix.* Where it was removed by *certiorari*, the court held that the plaintiff below was not bound to follow it. *Clark v. Mayor of Berwick*, 4 B. & C. 649, and *see Edwards v. Bowen*, 5 B. & C. 206. But the defendant, in such a case, may move to quash the *certiorari*, and sue out a *recordari*. *Ruffman v. Thornwell*, 7 Dougl. 613.

If the *recordari* be delivered to the court below, even after interlocutory judgment, but before final judgment, it has the effect of staying all further proceedings in such court. *Benas v. Protheck*, 2 Burr. 1151, and *see Wright v. Lewis*, 9 Dougl. 183. In practice, it is delivered at the office of the undersheriff, who will thereupon return it, and give you the writ and return, which you will then file with the proper officer in the court above, and give notice thereof to the plaintiff, his attorney or agent.

Appearance and Declaration.] As soon as the cause has been removed into the court above, the defendant should enter an appearance to it; *see ante*, p. 115; or the plaintiff may compel him by writ of *pone per vadios*, and *distringas*, &c. As this is very seldom necessary in practice, the defendant usually being willing enough to proceed in the action without compulsion, it is unnecessary further to notice it.

But if the defendant wish to compel the plaintiff to declare, then after entering an appearance, he should enter a rule to declare with the proper officer (*see R. G. H. 2 W. 4, s. 38*), which expires in four days; he should also demand a declaration in writing, of the plaintiff, his attorney or agent: and if at the expiration of the rule, and at the expiration of four days after the demand so made, the plaintiff have not declared, the defendant may sign judgment of *non pros*. *See R. G. T. 1 W. 4, s. 8, ante*, vol. 1, p. 225. *See Ward v. Creasy*, 2 Moore, 642.

Avowry.] If the plaintiff wish to compel an avowry, he must rule the defendant to avow, and demand an avowry in the same manner as a rule to plead is given and a plea demanded; and if the defendant do not avow or make cognizance in due time, the plaintiff may sign judgment by default, execute a writ of inquiry, sign final judgment, and sue out execution, in the same manner as in any other action.

Get the avowry or cognizance drawn by counsel or a pleader, and signed by counsel; and then deliver it to the opposite attorney or agent.

Plea in bar.] The defendant may rule the plaintiff to plead in bar, and deliver a plea in bar, in the same manner as he rules him to reply, and demands a replication, in other actions.

and if at the expiration of the rule, and of four days from the mand of plea, the plaintiff have not pleaded in bar, the defendant may sign judgment of *non pros*.

Issue, trial, &c.] The issue is the same as in ordinary cases; it may be made up either by the plaintiff or the defendant, both parties are actors in replevin. For the same reason, her party may give notice of trial, make up the *nisi prius* record, and enter it with the marshal for trial.

The proceedings upon a demurrer are also the same as in ordinary cases.

If a verdict be found for the plaintiff, it is of course for damages; and he will be thereupon entitled to his judgment and execution, in the same manner as in ordinary cases. The damages in ordinary cases, where no special damage is laid and proved, are in practice always assessed at 2*l.* 2*s.* in London, Middlesex, York, and some other places; 2*l.* 10*s.* elsewhere.

If a verdict be found for the defendant, or the plaintiff be nonsuit, the defendant at common law was entitled to judgment *de retorno habendo*, and to a writ *de retorno habendo* thereupon. But if he avow or make cognizance "for rents, customs, services, or for *damage feasant*," and the avowry, or be found for him, or the plaintiff be nonsuit or otherwise, the defendant shall recover his damages and costs against the plaintiff. 21 *H.* 8, c. 19, s. 3. 7 *H.* 8, c. 4, s. 3. And now, by stat. 17 C. 2, c. 7, s. 2, in case of a distress for rent, if the plaintiff shall be nonsuit after avowry or cognizance made or issue joined, or if a verdict be given against the plaintiff, the jury at the prayer of the defendant shall inquire concerning the arrears, and the value of the goods or cattle distrained; and thereupon the defendant shall have judgment "for such arrearsages, or so much thereof as the goods or cattle distrained amount unto, together with his full costs, and shall have execution thereupon by *feri facias* or *elegit*, or otherwise as the law shall require. The defendant, however, is not bound to proceed upon any of these statutes, unless he ask it; but he may still take his judgment as at common law. See *Hofford v. Alger*, 1 *Taunt.* 218.

Writ of Enquiry.] If the plaintiff have judgment by default, he may execute a writ of enquiry, sign final judgment, and set out execution, as in ordinary cases.

But where the avowry is for rent, customs, services or *damage feasant*, if the defendant have judgment on demurrer, or judgment of *non pros* for want of a plea in bar or subsequent pleading by the plaintiff, as in that case he is entitled to his damages, by the statutes already mentioned, *supra*, a writ of enquiry may be awarded and issued, and his damages, by stat. 21 *H.* 8, c. 19, or the arrears of rent and the value of

the goods by stat. 17 C. 2, c. 7, s. 3, 2, shall be assessed, and he shall have judgment accordingly. Or if the plaintiff be nonprossed before avowry, then the defendant, in *causa* of distress for rent, after entering judgment at common law, *de retorno habendo* (see *Baker v. Lade*, *Carth.* 253. *Cooper v. Sherbrooke*, 2 *Wils.* 116), may enter on the roll a suggestion in the nature of an avowry, and pray a writ of enquiry to be awarded, and which is accordingly awarded and issued as above mentioned. 17 C. 2 c. 7, s. 2. See 1 *Saund.* 195, n. 3. 2 *Saund.* 286, s. 5. In cases within this statute 17 C. 2, fifteen days' notice of enquiry must be given. 17 C. 2, c. 7, s. 2. *Burton v. Hickey*, 6 *Taunt.* 57. See the form of the suggestion and award of enquiry, after nonpros for not declaring, *Arch. Forms*, 420, and of the writ of enquiry, inquisition, judgment and execution, *Id.* 421—423; of the award of enquiry, &c. on a nonpros for want of a plea in bar, *Id.* 426—428; the like upon a demurrer, *Id.* 429.

Costs.] If the plaintiff recover, he is entitled to costs, as in other personal actions. See *ante*, p. 39.

As to the defendant's costs: where the distress is for rent, relief, heriot or other service, if the plaintiff "become nonsuit, discontinue his action or have judgment given against him," the defendant shall have double costs of suit. 11 G. 2, c. 19, s. 22. See *Gurney v. Buller*, 1 B. & A. 670. And which double costs consist of, first, the whole of his single costs, including the expenses of his witnesses, counsel's fees, &c. and then half that amount added to it: *Staniland v. Ludlam*, 4 B. C. 889, and see *ante*, p. 65. Even where it was alleged that the distress was made for the purpose of trying a title to certain lands, several avowries in various rights having been pleaded, the defendant was holden entitled to double costs under this statute. *Johnson v. Lawson*, 2 Bing. 341, and see *Staniland v. Ludlam*, *supra*. In all other cases he is entitled to single costs only, see 21 H. 8, c. 19, s. 3, 7 H. 8, c. 4, s. 3. 17 C. 2 c. 7, s. 2. *Ante* p. 185. *Butterton v. Furber*, 1 Brod. & B. 517. *Davies v. James*, 1 T. R. 371, unless otherwise ordered by some particular statute on which the distress or other proceeding may be founded.

As to costs, where there are several issues, some found for the plaintiff and some found for the defendant, see *ante*, p. 58.

Judgment and Execution.] The judgment for plaintiff, is the same as in trespass; and the execution, the same as in ordinary cases. See the forms, *Arch. Forms*, 430.

The judgment for the defendant, at common law, is, that he have a return of the goods, irreplevisable for ever, and his costs; and the execution may be by *fi. fa.* or *ca. sa.* for the costs,

and by writ *de retorno habendo* for a return of the goods, and after that, if nihil or *elongata* be returned, a *capias* in *Withernam*. See the forms, *Arch. Forms*, 418, 419; 425, 429; 431, 432.

The judgment for the defendant, under stat. 21 H. 8, c. 19, is, that the defendant have a return of the goods, and also his damages and costs; and the execution may be by *ft. fa.* or *ca. sa.* for the damages and costs, and by writ *de retorno habendo*, &c. for a return of the goods. See the forms, *Arch. Forms*, 426, 432.

The judgment for the defendant, under stat. 17 C. 2, c. 7, is, that the defendant do recover the amount of the arrears of rent, or value of the goods, as found by the jury, and his costs; and the execution is by *ft. fa.* or *ca. sa.* See the forms, *Arch. Forms*, 420, 427, 433, 434.

4. Collateral proceedings.

The defendant cannot have judgment as in case of a non-suit; for both he and the plaintiff being equally actors, he may himself take the cause down to trial, without a proviso. *Ante*, vol. 1. p. 347.

Where there were several avowries for rent, the court allowed the plaintiff to pay money into court, with respect to the rent claimed in one of them. *Vernon v. Wynne*, 1 H. Bl. 24.

CHAPTER III.

Penal actions.

Proceedings in.] The process is by writ of summons and *distringas*, unless the statute giving the penalty allow the defendant to be holden to bail, and then by writ of *capias*. These writs are in the ordinary form, except that after the words "at the suit of," [the plaintiff], you add "*who sues as well for our Lady the Queen as for himself in this behalf*," or as the case may be. As to the time limited for bringing the action, see *ante*, p. 97.

Let the declaration be drawn by counsel or a pleader. The venue must be laid in the county in which the offence was committed, 31 El. c. 5. See *Arch. Nisi Prius*, 245.

The other proceedings in the cause, are the same as in ordinary cases.

The plaintiff, if he recover, is not entitled to costs, unless given to him expressly by statute; *ante*, p. 39; but the defendant will be entitled to costs, if he have judgment. 1 El. c. 53. *Ante*, p. 56, 57.

Compounding.] Compounding penal actions without the leave of the court, renders the parties liable to pay a penalty of £10, and to stand in the pillory; 18 *El. c. 5, s. 2*; but with the leave of the court, and where the crown is concerned, with the consent of the attorney general, *Howard v. Sowerby*, 1 *Taunt.* 103. *Sheldon v. Mumford*, 5 *Taunt.* 268. *R. v. Gibbs*, 3 *Dowl.* 345, the informer and the defendant may compound the action. 18 *El. c. 5, s. 3, 6*. See *Whitehead v. Wynn*, 5 *M. & S.* 427. Also, by *R. G. H. 2 W. 4, s. 99*, "leave to compound a penal action shall not be given, in cases where part of the penalty goes to the crown, unless notice shall be given to the proper officer; but in other cases it may." The court seldom refuse leave to compound, where the crown is concerned, and the consent of the attorney general is obtained; but they are more strict in other cases. See *Hemson v. Speange*, 2 *Smith*, 195, *Howell v. Morris*, 1 *Wils.* 79. *Bellis v. Beale*, 1 *Chit.* 381, *n.* The informer, besides his moiety of the penalty, as compounded, is allowed also to stipulate for the payment of his costs by the defendant, *North v. Smart*, 1 *B. & P.* 5, even in cases where the plaintiff would not be entitled to costs if he had proceeded to trial, *Wood v. Johnson, & Wood v. Cassin*, 2 *W. Bl.* 1157, provided in this latter case the sum stipulated for costs, be not so greatly disproportionate to the penalty, as to show that the composition is collusive, and for the sake of the costs only. *Id. see Lee v. Cass*, 2 *Taunt.* 213.

The motion for leave to compound, cannot be made until after plea pleaded. *R. v. Collier*, 2 *Dowl.* 581. But it may be made at any time after plea and before trial; and in some cases, under particular circumstances, the court have allowed it to be done even after verdict. *Maughan v. Walker*, 5 *T. R.* 98. *Morgan v. Lute*, 1 *Chit.* 381; but see *Crouder v. Wagstaff*, 1 *B. & P.* 18.

The notice to the proper officer, must be first given. *Supra.* Then the attorney general's consent, indorsed on a motion paper, must next be obtained. *Supra.* Then the Queen's part of the penalty must be paid; in the Queen's Bench to the master of the Crown Office, *R. M. 7 G. 3. Brown v. Bailey*, 4 *Burr.* 1929, and in the other courts to the masters. See *Wood v. Ellis*, 2 *W. Bl.* 1154. The motion is then made on an affidavit of these facts, and the production of the attorney general's consent; and the court grant the rule. As to the form of the affidavit, see *Arch. Forms*, 546. And as to the rule, see *R. E. 33 G. 3. B. R. King v. Clifton*, 5 *T. R.* 257.

CHAPTER IV.

Feigned issue.

If a feigned issue be ordered by a court of equity, the terms of it are dictated by the court, and form the subject of an interlocutory decree or order; if by a court of law, the terms of it are comprised in the rule made upon the subject. *Let the plaintiff's attorney get a copy of the decree or rule, and lay it before counsel, with instructions to draw the issue; and when drawn, serve a copy of it upon the opposite attorney, who will get it settled by counsel upon his part. When settled, you may give notice of trial, sue out jury process, make up the nisi prius record, and proceed to trial, as in ordinary cases. In feigned issues from a court of equity, it is not necessary or usual to sign final judgment.*

If the issue be directed by a court of equity, that court will make such order as to costs as it may think right. But if the issue were directed by a court of law, the costs follow the event of the issue, in the same manner as in an ordinary action; the court have no authority to order otherwise, *Herbert v. Williamson*, 1 Wils. 324. *Ld. Fitzwilliam v. Maxwell*, 7 Taunt. 31, unless perhaps where they reserve that authority, by consent of the parties, at the time they grant the issue, or as a condition of their granting it. *See Hoskins v. Ld. Berkely*, 4 T. R. 402.

If the issue be out of Chancery, any motion for a new trial must be made to that court by which the issue was directed. Even where the judge at the trial reserved certain points of law for future consideration, the court of law refused to entertain the motion for a new trial. *Stone v. Marsh*, 8 Dougl. 71.

BOOK IV.

PROCEEDINGS IN ACTIONS BY AND AGAINST PARTICULAR PERSONS.

CHAPTER I.

Actions by and against attornies.

SECTION 1.

Action by an attorney, for the amount of his bill of costs.

This subject has been already fully considered in the first volume of this work, in treating of attornies. We shall therefore treat of it here generally and concisely, referring the reader to those parts of the former volume, where he will find the subject treated of specifically and more at large.

Delivery of Bill.] In all cases in which an attorney seeks to recover, by action or suit, the amount of any "fees, charges or disbursements, at law or in equity," he shall cause a bill thereof, subscribed with his proper hand, to be delivered to the party to be charged therewith, one lunar month exclusively before the commencement of the action or suit. 2 G. 2, c. 23, s. 23. As to what are "fees, charges, or disbursements," within the meaning of the statute, see *vol. 1, p. 70*; and how it is to be written, subscribed, and delivered to the client, *Id. p. 71*.

Process and Declaration.] An attorney has the privilege of bringing his action in the court of which he is an attorney, and of laying his venue in Middlesex, no matter where he is resident. *Vol. 1, p. 63*. The process is the same as in ordinary actions on promises; and the declaration is a common indebitatus count in assumpsit, for work and labour as an attorney, to which may be added a count upon an account stated. It may be necessary to mention that an attorney is not bound to sue in a court of requests, unless his privilege in that respect be taken away by the express words of the statute creating or regulating the court. *Vol. 1, p. 64*.

[*evidence of plaintiff under the general issue.*] Under the general issue, the plaintiff must prove his retainer, either expressly, or by proving circumstances from which it may be inferred; *vol. 1, p. 75*; he must then prove that the business charged for was done; *Id. 75*; and lastly that the charges are reasonable. *Id. 75, 76.*

[*defence and evidence.*] Where the action is brought for fees, charges or disbursements," within the meaning of the statute, it will be a good defence that no bill thereof, signed by the plaintiff, was delivered to the defendant, one lunar month exclusively before the commencement of the action; this defence must be specially pleaded; *vol. 1, p. 76*; and the onus of proof will be upon the plaintiff.

That the business was done at a time when the plaintiff was certificated, will also be a good defence; *vol. 1, p. 76, 54*; and it must be specially pleaded.

That the business, although done in the name of the plaintiff, was in fact done wholly or in part for the benefit of an unqualified person, will also be a good defence to the action. *Vol. 1, p. 76, 77.*

That the business charged for, proved wholly useless to the plaintiff, whether arising from gross negligence or ignorance, or from inadvertence or inexperience only, of the attorney, will be a good defence; but not where the negligence, &c. has been merely injurious, or where it has not been the sole cause of the proceedings being useless. *Vol. 1, p. 77.*

The defendant may also set up as a defence, that the plaintiff agreed to do the business, without charging him anything for the same, or upon such other terms as may form a defence to the action. *Vol. 1, p. 77.*

SECTION II.

Action against an attorney.

If the client sustain damage or injury from the negligence, want of skill or misconduct of his attorney, whilst employed by him, as such, he may maintain an action on the case or of assumpsit against his attorney for it. A number of instances are mentioned *ante*, *vol. 1, p. 89, 95*, in which the court will interfere in a summary manner, upon the application of the client, and afford him a remedy in such cases or punish the attorney; and not only in those instances, may the client maintain an action against the attorney, if he prefer that mode of proceeding, but in all others wherein he can prove that he sustained damage from his attorney's negligence, ignorance or misconduct.

The process in such an action, is the same as in ordinary cases. The declaration is of course special. The defendant has the privilege of being sued in that court alone of which he is an attorney; *See Groom v. Wortham*, 12 *Law J.* 88, *cp.*; but he has no privilege as to venue, and therefore cannot change the venue to Middlesex or insist on its being laid there, unless the cause of action arose there. *Vol.* 1, *p.* 63. And he must plead within four days, no matter at what distance from London he may reside. *Kinder et al. v. Dunford*, 10 *Law J.* 131, *qb.*

It may be necessary to mention, that an attorney cannot be sued in a court of requests, unless his privilege in that respect be taken away by the statute creating or regulating the court. *Vol.* 1, *p.* 64.

CHAPTER II.

Actions by and against bankrupts and their assignees.

SECTION I.

Actions against bankrupts.

Their discharge from arrest, in what cases.] By stat. 6 G. 4, c. 16, s. 126, if a bankrupt, after obtaining his certificate, be arrested for any "debt, claim, or demand," proveable under the fiat, he shall be discharged on entering a common appearance; or to an action for such debt, he may plead his bankruptcy, and his certificate shall be sufficient evidence of the trading, bankruptcy, fiat, and other proceedings; and if he be taken in execution or detained in prison for such debt, &c., where judgment has been obtained before the allowance of his certificate, a judge of the court, on the bankrupt's producing his certificate, may order the officer, who has him in custody, to discharge him, without exacting any fee. A bankrupt therefore, arrested or detained on mesne process, or in execution, may be discharged by order of a judge, upon summons, and production of his certificate, *see ante*, vol. 1, *p.* 135, the certificate being first duly enrolled. *Jacob v. Phillips*, 2 *Dowl.* 716. *Osborne v. Williamson*, 1 *Mees & W.* 550, *S. C. nom.* *Oswald v. Williams*, 5 *Dowl.* 159. And it is no objection to his discharge to say that he had an opportunity of pleading of his certificate, and neglected to do so: *Oswald v. Williams*, 5 *Dowl.* 159; or that he had agreed to give a cognovit; *Id.*; or that he was before a bankrupt or insolvent, or

compounded with his creditors, and had not paid 15s. in pound under the present fiat; *See* 6 G. 4, c. 16, s. 127. *v. Edwards*, 2 Dougl. 613; or that the certificate is void, by reason of there not being a good petitioning creditor's or act of bankruptcy, or the like. *Semb.* But if it be that the certificate is actually void, by reason of its having been obtained by fraud, see *Horn v. Ion*, 4 B. & Ad. 1. *Vincent v. Brady*, 2 H. Bl. 1. *Sowley v. Jones*, 2 W. Bl. 1. *Martin v. O'Hara*, Cowp. 823, or by reason of the bankrupt having lost money by gaming, stockjobbing, &c., within 12, c. 16, s. 130, see *Hughes v. Morley*, 1 B. & A. 22, *Holt*, or the like, a judge will not interfere, or discharge the bankrupt. See further upon this subject, *ante*, vol. 1, p. 135. As to his temporary privilege from arrest, during the forty days allowed him by his protection, see *ante*, vol. 1, p. 164. As to the effect of his certificate in discharging his bail, see *ante*, vol. 1, p. 207.

The above statute relates only to cases where the person of the bankrupt is taken or detained. But where his goods are in execution, after he has obtained his certificate, the court usually order them to be delivered up; see *Lister v. H. & P.*, 1 B. & P. 427; although they have refused to do so, the goods were seized, and the certificate allowed, on the same day. *Hanson v. Blakey*, 4 Bing. 493.

[*Effect of Creditor's Action.*] A creditor who has brought an action against a bankrupt, for a debt proveable under the fiat, must elect whether he will proceed in his action, or prove against the estate: he shall not be allowed to prove for the debt without relinquishing his action; and if he have the bankrupt's certificate, he must first discharge him before he shall be allowed to prove. 6 G. 4, c. 16, s. 59. See *Eicke v. Nokes*, 2 Dougl. 20. and see *ante*, vol. 1, p. 135. *Watson v. Medex*, 1 B. & A. 1. *Harley v. Greenwood*, 5 B. & A. 95. And the bankrupt is not allowed to have a suggestion of the fact of the plaintiff's debt proved, entered upon the record; before which the action is not legally terminated, so as to render further proceedings in it by either party irregular. *Kemp v. Potter*, 6 B. & A. 549. But the court will not interfere to stay proceedings in the action; that can only be done by the court of review, or the court of chancery. *Ransford v. Barry*, 7 Dougl. 807. The bankrupt may, if he will, notwithstanding such proof, proceed to trial by proviso. *Whitaker et al. v. Mason*, 4 Bing. 103.

[*Effect of Bankruptcy on a Suit.*] The bankruptcy of either party does not abate a suit. And therefore if the plaintiff be a bankrupt between interlocutory and final judgment, the defendant may proceed in his name to final judgment, then

make themselves parties to the record by *scire facias*, and sue out execution in their own names; *Hewit v. Mantell*, 2 Wils. 372. and see *Kretchman v. Beyer*, 1 T. R. 463; and even where execution was sued out in the name of the bankrupt, without a *scire facias*, the court refused to interfere to set it aside. *Waugh v. Austin*, 8 T. R. 437. But this cannot be done, if the defendant have a day in court, so that he may plead the plaintiff's bankruptcy; and to such plea it would be no answer to say, that the assignees are going on with the suit for the benefit of the creditors. *Kinnear v. Tarrant*, 15 East, 622. But the assignees may, if they think fit, instead of continuing the bankrupt's action, commence a fresh action against the defendant, *Smith v. Hirst*, MS. T. 1821, B. R., to which the defendant cannot plead the pendency of the action at the suit of the bankrupt. *Biggs v. Cox*, 4 B. & C. 920. On the other hand, where a defendant becomes bankrupt, if the plaintiff do not elect to abandon the action, and prove under the fiat, as above mentioned, the defendant, if certificated, may plead his bankruptcy generally, or may plead his bankruptcy and certificate *puis darrein continuance*; or if the cause be tried before his bankruptcy, he may move to set aside the verdict after his bankruptcy, and even after he has obtained his certificate. *Shepherd v. Thompson*, 9 Mees. & W. 110; but if not certificated, the plaintiff may of course continue his action to judgment and execution, as in ordinary cases. See *Flight v. Glossop*, 1 Hodg. 122.

As to the mode of proceeding against a trader subject to the bankrupt laws, see *ante*, vol. 1, p. 215.

SECTION II.

Actions by or against assignees.

In an action by or against assignees of a bankrupt, or against any commissioner, or any person acting under his warrant, no proof shall be required of the trading, act of bankruptcy, or petitioning creditor's debt, unless the party wishing to contest it, "if defendant, at or before pleading, and if plaintiff, before issue joined," give a notice of his intention to dispute some and which of such matters; and if the assignee, &c., succeed in proving the matters so disputed at the trial, the judge may grant him a certificate thereof, which will entitle him to the costs of having done so, although there be a verdict against him. 6 G. 4, c. 16, s. 90. see *Trimley v. Unwin*, 6 B. & C. 537. And this, even although the bankruptcy be denied by the pleadings. *Moon v. Raphael*, 1 Hodg. 289. But where an assignee is plaintiff, he shall not be entitled to the costs above-mentioned, if he be nonsuit. See *Atkins v. Seward*, 1 Brod. & B. 275.

CHAPTER III.

Actions against Clergymen.

Proceedings to judgment.] The proceedings in an action against a clergyman, to judgment inclusive, are the same precisely as in ordinary cases. He is privileged, however, from arrest, in going to perform divine service, whilst performing it, and in returning from performing it. *Ante*, vol. 1, p. 163; and see *Goddard v. Harris*, 7 Bing. 320.

If a clergyman be outlawed, and the sheriff return to a special *capias utlagatum* that he has benefices, but no lay fee, the court of Exchequer, upon application of the plaintiff, will award a writ of *Levari facias de bonis ecclesiasticis* to the bishop, to sequester the ecclesiastical profits of the defendant's benefices. *R. v. Hind*, 1 Tyr. 347. *R. v. Armstrong*, 2 Cr. M. & R. 205.

Execution.] The plaintiff may have execution, by writ of *capias ad satisfaciendum*, as in ordinary cases. As to the defendant's privilege from arrest, and as to outlawry, *vide supra*.

Or, if you wish to levy the debt upon his goods, &c., you may sue out a *feri facias* as in ordinary cases; and if he have none, or not enough to satisfy the judgment, you may get the sheriff to return the writ, and to certify in his return that the defendant is a beneficed clerk, if such be the fact. See the form of the return, *Arch. Forms*, 517. You may then sue out a *feri facias de bonis ecclesiasticis*, directed to the bishop, commanding him to levy the amount of the debt and costs, of the ecclesiastical goods of the defendant in his diocese. See the form, *Arch. Forms*, 518. Take this to the bishop's registrar, who will thereupon grant a sequestration directed to the churchwardens, commanding them to levy accordingly.

Or instead of suing out a *feri facias de bonis ecclesiasticis*, you may sue out a writ of *sequestrari facias*, or *levari facias de bonis ecclesiasticis*, as it is sometimes termed, directed also to the bishop, whereby, after reciting the common *fi. fa.* and return, the bishop is commanded to enter the rectory and parish church of ———, and take and sequester the same into his possession, and to hold the same, until he shall have levied the amount of the debt and costs, of the rents, tithes, and profits, &c. thereof. This is a continuing execution, under which the profits of the benefice accruing after the publication of the sequestration, (see *Wait v. Bishop et al.* 1 Cr. M. & R. 507. *Bishop v. Hatch*, 3 Nev. & M. 498. *Bennett v.*

Apperley, 6 B. & C. 630.) are from time to time received by a sequestrator appointed for the purpose, without reference to the time at which the writ is nominally returnable: he continues to receive the tithes, &c., and to pay the expenses, until a sufficient sum has been realized to answer the amount of the debt and costs, *See Cottle v. Warrington*, 5 B. & Ad. 447, or until the bishop is ruled to return the writ. *See Marsh v. Fawcett*, 2 H. Bl. 582. Ruling the bishop to return the writ, has the effect of putting an end altogether to the sequestration; *Id.*; and therefore it is, that the defendant cannot rule the bishop to return the writ; the plaintiff alone can do so; all the defendant can do is to rule the bishop to state what sum he has levied under the writ, with the costs and charges of such levy. *Hart v. Volans*, 1 Dougl. 434. So if the plaintiff wish to receive the money levied, without putting an end to the sequestration, he may in like manner rule the bishop to state what he has levied, and to pay the same over, &c. *Marsh v. Fawcett*, *supra*. *See Elchin v. Hopkins*, 7 Dougl. 146. *Phillips v. Berkley*, 5 Dougl. 279. If the bishop return the writ by mistake, before the debt is satisfied, the court upon application will order the writ and return to be taken off the file and sent back to the bishop, in order that he may take the return off the writ, and instead thereof merely certify the amount he has levied. *Alderton v. St. Aubyn*, 6 Mees. & W. 150. In respect to the execution of this writ, and the *feri facias de bonis ecclesiasticis*, it may be necessary to observe that the bishop, as returning officer, is as fully under the control of the court out of which they issue, as a sheriff in respect to the ordinary writ of *feri facias*; *see R. v. Bp. of London*, 1 D. & R. 486; the sequestrator appointed by the bishop, is merely his bailliff or agent. *Hardinge v. Hall et al.* 10 Mees. & W. 42.

CHAPTER IV.

Actions by and against Corporations.

Corporations sue and are sued in their corporate name, unless a power have been given to them by statute to sue or be sued in the name of one of their officers. Actions by them were always, and still are, the same as in ordinary cases by individuals. Actions against them formerly must have been by original attachment and *distringas*; but now the proceeding is the same as against any individual, namely, by summons and *distringas*, *see 2 W. 4, c. 39, s. 1*, except that "every

such writ of summons issued against a corporation aggregate, may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer or secretary of such corporation. *Id.* s. 13.

CHAPTER V.

Actions by and against Executors and Administrators.

SECTION I.

Actions by them.

Process, &c.] In what cases an executor or administrator may sue, see 1 *Saund.* 216, note 1; 3 & 4 *W.* 4, c. 42, s. 2. The action is commenced by writ of summons, as in ordinary cases, but describing the plaintiff as executor or administrator, thus: "*At the suit of A. B. as executor of the last will and testament of C. D. deceased,*" or "*at the suit of A. B. as administrator of all the goods and chattels, rights and credits, which were of C. D. deceased, at the time of his death, who died intestate.*"

Costs.] Formerly, in all cases where an executor or administrator sued as such, and where he could have maintained the action only as executor or administrator, and not in his own right, he was not liable to costs if he were nonsuit or the defendant obtained a verdict, *Cooke v. Lucas*, 2 *East*, 398. *Tattersall v. Groote*, 2 *B. & P.* 253. *Barnard v. Higdon*, 3 *B. & A.* 213. *Wilton v. Hamilton*, 1 *B. & P.* 445. *Cockerill v. Kynaston*, 4 *T. R.* 277, however groundless the action might have been. *Jones v. Williams*, 6 *M. & S.* 178. Nor was he liable for costs upon judgment as in case of a nonsuit. *Booth v. Holt*, 2 *H. Bl.* 277. *Cooke v. Lucas*, 2 *East*, 395. *Woolley v. Sloper*, 2 *Dowl.* 208. *Pickup v. Wharton*, *Id.* 388. And the court would allow him to discontinue, without paying costs, unless it appeared that he knowingly brought a wrong action, or that it was plainly his own fault that rendered the discontinuance necessary. *Stubbing v. Hammond*, 8 *Moore*, 689. *Wright v. Jones*, 2 *Smith*, 260. *Harris v. Jones*, 3 *Burr.* 1451. *Bennett v. Coker*, 4 *Burr.* 1927. *Melhuish v. Maunder*, 2 *New Rep.* 72.

But now, by stat. 3 & 4 *W.* 4, c. 42, s. 31, "in every action brought by an executor or administrator in right of the testator or intestate, such executor or administrator shall (unless the court in which such action is brought, or a judge of any

of the superior courts, shall otherwise order) be liable to pay costs to the defendant, in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable, if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner." An executor plaintiff, therefore, in all the cases above-mentioned, is liable to costs, unless he can make out to the satisfaction of the court or a judge, that there are particular circumstances in his case, which will justify the court or judge in exempting him, by an exercise of that discretionary authority here given them. *Per Tindal, C. J. in Wilkinson v. Edwards*, 1 Bing. N. C. 303, 301. *Farley v. Briant*, 1 Har. & W. 775, and see *Lysons v. Barrow*, 2 Doucl. 807. And the court will not relieve him from payment of costs, where he has been guilty of vexatious conduct in the management of his cause; *Wilkinson v. Edwards*, 1 Bing. N. C. 301, 3 Doucl. 137; or where he has proceeded to trial without sufficient evidence; *Southgate et. al. v. Crowley*, 1 Bing. N. C. 518. S. C. 3 Doucl. 386, *nom. Brown v. Crowley*; or where he might, by diligence, have ascertained that the defendant had a good defence to the action. *Engler v. Twissden*, 2 Bing. N. C. 263. And not only will the court refuse to exempt the plaintiff, in the cases now mentioned, but as the act was made for the benefit of defendants, they will require it to be shown that the defendant has forfeited by misconduct the right the act gives him, before they will interfere. *Godson v. Freeman*, 2 Cr. M. & R. 585. and see dict. *per Tindal, C. J. 1 Bing. N. C. 522*, and the judgment of *Ld. Denman, C. J. in Farley v. Briant*, 1 Har. & W. 776. The application should be made before the costs are taxed, otherwise, even if the court grant it, it will only be upon payment of the costs of the application. *Ashton v. Poynter*, 1 Gale, 57. This application may be made to a judge at chambers; *supra*; and it was in one case holden by the court of King's Bench that the judge's order in such a case was final, and that the court could not review it; *Maddocks v. Phillips*, 5 Nev. & M. 370, 1 Har. & W. 251; but the court of Exchequer have since expressed a strong opinion to the contrary. *Larkin v. Massie*, 1 Gale, 270, 4 Doucl. 239.

But if an executor or administrator declare for a cause of action arising after the death of the testator, or intestate, *Bollard v. Spencer*, 7 T. R. 358. *Worfield v. Worfield*, Latch. 220. *Athey v. Heard*, Cro. Car. 219. *Hollis v. Smith*, 10 East, 293. *Jones v. Jones*, 1 Bing. 249, or if he have any one count for such a cause of action in his declaration; *Dowbiggin v. Harrison*, 9 B. & C. 666. *Jobson v. Foster*, 1 B. & Ad. 6. *Slater v. Lawson*. 1 B. & Ad. 893. *Cockerill v. Kynaston*, 4 T. R. 277. and see *Spivy v. Webster*, 2 Doucl. 46; or if he sue

Actions against Executors and Administrators. 199

as executor or administrator, when he might have sued in his own right, *Goldikwayte v. Petrie*, 5 T. R. 234, or have any one such count in his declaration: *Grimstead v. Shirley*, 2 Taunt. 116: if in any of these cases the defendant have a verdict, or the plaintiff be nonsuit, the latter will be liable to costs. So if an executor or administrator be nonprossed, he is liable for the costs of the *non pros*. *Higgs v. Warry*, 6 T. R. 654. *Hawes v. Saunders*, 3 Burr. 1584. So he shall pay the costs of the day for not proceeding to trial. *Per cur.* 1 Salk. 314. *Ogle v. Maffatt, Barnes*, 107. *Per Yates, J.* 4 Burr. 1929. And these cases are not within stat. 3 & 4 W. 4, c. 42, s. 31, above-mentioned, that statute extending only to cases in which an executor, as plaintiff, was formerly not liable to costs; *Spence v. Albert*, 4 Nev. & M. 385, 1 Har. & W. 7. *Ashton v. Peynter*, 3 Doubl. 465, 1 Gale, 57; and therefore the court cannot, in their discretion, relieve the plaintiff from his liability for costs, in the cases just now mentioned.

2. Actions against them.

Process, &c.] In what cases an action will lie against an executor or administrator, see 1 Saund. 216, note 1, and stat. 3 & 4 W. 4, c. 42, ss. 2, 14. The action is commenced by writ of summons, as in ordinary cases, but describing the defendant as "executor of the last will and testament of C. D. deceased," or "administrator of all the goods and chattels, rights and credits, which were of C. D. deceased, at the time of his death, who died intestate."

Costs.] If an executor or administrator plead a plea, which admits his character of executor, &c. and it be found against him, the judgment will be, that the plaintiff recover against him the debt or damages and costs, to be levied of the goods of the testator or intestate, if he have so much in his hands, and if he have not, then the costs to be levied of the proper goods and chattels of the defendant. 1 Saund. 336, note 10. If he plead *ne unques executor or administrator* only, and it be found against him, the judgment will be that both debt and costs be levied *de bonis testatoris si, &c. et si non, &c. de bonis propriis*. 1 Saund. 336 b. But if the defendant plead several pleas, each going to the whole cause of action, and issue be taken upon them, if he succeed upon any one of them, he will be entitled to the *postea* and the general costs of the cause, as in ordinary cases. See ante, p. 58. Thus, where an executor pleaded *non assumpsit*, the statute of limitations, and *plene administravit*, and the two first were found against him, but the last for him, it was holden that he was entitled to the *postea* and the general costs of the cause. *Ragg v. Wells*,

200 *Actions against Executors and Administrators.*

8 Taunt. 129. *Hogg v. Graham*, 4 Taunt. 136. See *Hindsley v. Russell*, 12 East, 232, *cont.* So where an executor pleaded *non assumpsit*, *ne unques executor*, and *plene administravit*, and the last alone was found for him, the court held him to be entitled to the *postea* and the general costs of the cause. *Edwards v. Bethel*, 1 B. & A. 254. But where the plaintiff, instead of taking issue on the *plene administravit*, took judgment of assets *quando acciderint* on that plea, and obtained a verdict on the *non assumpsit*, it was holden that he was entitled to judgment, that the damages and costs should be levied *de bonis testatoris si, &c. et si non, &c.* the costs to be levied *de bonis propriis*. *Marshall v. Willder*, 9 B. & C. 655. If on the other hand all the issues be found for the defendant, he will of course be entitled to costs, as in ordinary cases. But if *plene administravit* alone be pleaded, and the plaintiff, instead of replying to it, take judgment of assets *quando, &c.* the defendant is not liable to costs, 1 Saund. 336 *b*, but the plaintiff shall have judgment for his costs as well as his debt or damages *de bonis testatoris* only, *quando, &c.* *Cox v. Peacock*, 4 Dowl. 134.

Devastavit.] If an executor or administrator, upon being sued, allow judgment to pass against him by default, or do not plead *plene administravit*, *Palmer v. Waller et al.* 1 Moes. & W. 689, or if he plead such plea and it be found against him, he thereby admits that he has assets of the testator or intestate to the amount of the plaintiff's claim; and if a *fi. fa. de bonis testatoris* afterwards issue against the defendant, and no such goods be found, the sheriff's return of *nulla bona* will be sufficient *prima facie* evidence that he has wasted them, and it will then be for the defendant to show that he did not waste the goods, but on the contrary he was ready to give them to the sheriff, and that it was therefore the sheriff's fault that he had not levied the debt, &c. of them. *Leonard v. Simpson*, 1 Hodg. 251, and see 1 Saund. 219, note 8, 337, note 1. Formerly in such a case, it was usual to proceed by a *scire fieri* enquiry, requiring the sheriff to levy the debt of the goods of the testator, if they could be found, but if not, and that it should appear by inquisition that the defendant had wasted them, then to warn him to appear, &c. See 1 Saund. 219, &c. But this is seldom adopted in practice at present. As to the costs of a *scire fieri* enquiry, see *Palmer v. Waller*, 5 Dowl. 315. The present practice is, to bring an action of debt on the judgment against the executor or administrator, suggesting a *devastavit*; and if you succeed in that, you may have execution against the property or person of the defendant, as in ordinary cases. See 1 Saund. 219 *a*, &c. *Ward v. Thomas*, 2 Dowl. 87.

CHAPTER VI.

Actions against Hundredors, &c.

inst Hundredors.] Formerly the mode of proceeding in an action against the inhabitants of a hundred, for damage by rioters, and in other cases, was by original writ and return. But now it is by writ of summons, as in ordinary cases; see 2 W. 4, c. 39, s. 1; and "every such writ issued to the inhabitants of a hundred or other like district, is served on the high constable thereof, or any one of the constables thereof." *Id.* s. 13. To this writ the high constable enters an appearance, and the proceedings then, to and inclusive, are the same as in other cases. As to an action against the hundred for damage feloniously done to goods by rioters, see *stat.* 7 & 8 G. 4, c. 31.

Execution for the plaintiff is by writ of *Aeri facias*, against the inhabitants of the hundred generally, directed to the sheriff of the county in which the hundred is situate. And in cases *stat.* 7 & 8 G. 4, c. 31, "wherever the plaintiff in any action shall recover judgment, whether after verdict or default or otherwise, no writ of execution shall be executed on any inhabitant of the hundred or other like district, nor on the high constable; but the sheriff, upon receipt of the writ of execution, shall (on payment of the fee of five shillings or more) make his warrant to the treasurer of the county, or division, in which such hundred or other like district is situate, commanding him to pay to the plaintiff the sum due by the said writ directed to be levied, and such treasurer is required to pay the same, as also any other sum due to be paid by him by virtue of this act, out of any money, which shall then be in his hands, or shall come into his hands before the next general or quarter sessions of assize for the said county, riding or division; and if there is not sufficient money for that purpose, before such sessions, he shall give notice thereof to the justices of the peace at such sessions, who shall proceed in the manner hereinafter mentioned." 7 & 8 G. 4, c. 31, s. 6. The *fi. fa.* shall be in this form: "The within damages are to be levied according to the writ of execution bearing date the 7 & 8 G. 4, c. 31," adding the attorney's name and address, and the day of the month and year. As to the mode of reimbursing the high constable for his expenses in bringing the action, see 7 & 8 G. 4, c. 31, s. 7. See also the ordinary mode of proceeding given by the statute, in all cases where the injury sustained does not exceed the sum of 30*l.* 3*s.* &c.

inst inhabitants of a city, &c.] In all actions against
k 3

"the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town or place, not being part of a hundred or other like district," the action in like manner must be commenced by writ of summons, as other non-bailable actions, (*see* 1 *W.* 4, c. 39, s. 1), and the writ may be served "on some peace-officer thereof." *Id.* s. 13.

CHAPTER VII.

Actions by and against Husband and Wife.

SECTION 1.

Actions by them.

In what cases husband and wife must join in the action, in what cases the husband must or may sue alone, *see Arch. Pl. & Ev.* 37—42. If a woman, living apart from her husband, bring an action in the joint names of her husband and herself, without her husband's consent, although the court will not interfere and stay the proceedings at the instance of the defendant, *Chambers v. Donaldson*, 9 *East*, 470, yet at the instance of the husband, they will stay the proceedings, until he is indemnified to the satisfaction of the master, against the costs of the action. *Harrison et ux. v. Almond*, 1 *Har. & W.* 119, 4 *Dowl.* 321. As to the affidavit to hold to bail, in an action by husband and wife, *see ante*, vol. 1, p. 424. The proceedings, in other respects, to judgment inclusive, are the same as in ordinary cases. Where husband and wife were taken in execution for the costs of a nonsuit, Pattenon, J. ordered the wife to be discharged, unless the defendant should show, within two days, that certain property, which it was alleged she was entitled to under a will, was settled to her sole and separate use. *Hoad v. Matthews*, 2 *Dowl.* 149.

If a feme sole obtain judgment, and marry before execution, a *scire facias* must be sued out to make the husband a party to the record, in order to execute the judgment. 2 *Saund.* 72 *k.* If a warrant of attorney be given to a feme sole, and she marry, judgment cannot be entered up without the leave of the court; and on an application for such leave, the court require an affidavit of the marriage, the due execution of the warrant of attorney, and of the debt being due and unpaid. *Metcalf et ux. v. Boote*, 6 *D. & R.* 46. On the other hand, if husband and wife obtain judgment, and she die, he may either sue out

facias, or proceed to execution in the joint names : *it.* 2 *Saund.* 72 l.

SECTION II.

Actions against them.

tions against them, the husband must enter an appearance both. Where an appearance was entered for both by the wife, but without the authority of the husband, and the husband on that account moved to set it aside: the court granted the motion, as it appeared that the wife had given in no appearance for it. *Williams v. Smith*, 1 *Dowl.* 692. If the action be brought against the wife alone, she must appear in person and not by attorney; at least, after appearing by attorney, she cannot plead or otherwise avail herself of her attorney.

holding a married woman to bail, with or without her husband, see *ante*, vol. 1 p. 126.

In process against husband and wife, it is doubtful whether the writ of attachment must not also be against both: they cannot, it seems, be treated as distinct persons, so as to warrant a writ of attachment against one alone. The other processes, to judgment, are the same as in ordinary cases; except in an action against husband and wife, the court will grant an attachment against the latter. *Doe v. Canfield* 1 *Dowl.* 523. On the other hand, where the husband is merely for conformity, the court under circumstances will grant an attachment for non-payment of money awarded to the wife, although it was sworn that the money had been paid to the husband upon a demand made by him. *Wynne v. et ux.* 1 *Dowl. N. C.* 723.

[*et ux.*] The writs of execution are the same as in ordinary cases. If a married woman, sued as a feme sole, be taken in execution, the court will not relieve her on the ground of her being married, but will leave her to her remedy by writ of *habeas corpus*. *Moses v. Richardson*, 8 B. & C. 421. So if a married woman be taken in execution with her husband, in an action against them for a debt due by the wife before marriage, the court will not discharge her, unless it appear that she has no property; and this, even although the husband has been charged under the Insolvent Act. *Sparkes v. Bell*, 7 l.

In an action brought against a feme sole, and she answers in person and before execution, the plaintiff may sue out a writ of *facias*, to make the husband a party to the record, and

204 *Actions by and against Idiots and Lunatics.*

then sue out execution against both; 2 *Saund.* 72 k; or he may proceed to execution against her alone, without a *scire facias*, *Cooper v. Hunchin*, 4 *East*, 521. See *Evans v. Chester*, 2 *Mees. & W.* 847. But in an action against a married woman, where she pleads her coverture and has a verdict, the husband cannot have execution for the costs, without a *scire facias*. *Wartley v. Rayner*, 2 *Doug.* 637.

CHAPTER VIII.

Actions by and against Idiots and Lunatics.

The proceedings in actions by or against idiots or lunatics, are the same as in ordinary cases, except that idiots must appear in person, and then any person who may pray to be admitted to sue or defend for them, shall be allowed to do so; but a lunatic must appear by guardian, if within age, or by attorney if of full age. 4 *Co.* 124, *Beverley's case*. See as to the execution of a *Distringas*, when the defendant is a lunatic in an asylum, *Humphreys v. Griffiths*, 6 *Mees. & W.* 89. *Branson v. Moss*, *Id.* 420. *Dodson v. Warne*, 1 *Dowl. N. C.* 848.

Also the court will not discharge a defendant, arrested upon mesne process, merely on the ground that he was a lunatic at the time of the arrest, *Nutt v. Verney*, 4 *T. R.* 121, or has since become so. *Kernot v. Norman*, 2 *T. R.* 390. *Ibbotson v. Ld. Galway*, 6 *T. R.* 133. *Steel v. Allen*, 2 *B. & P.* 362. And the same, where he is arrested under a *ca. sa.* or otherwise in custody in execution. The rule, it should seem, is the same in the case of an idiot.

CHAPTER IX.

Actions by and against Infants.

SECTION I.

Actions by infants.

An infant must sue by *prochein amy*, (usually the father, or some other friend with the father's concurrence, see *Claridge v. Crawford*, 1 *D. & R.* 13, *Watson v. Fraser*, 8 *Mees. & W.* 660.)

to be admitted by order of a judge. Upon a petition to the chief justice or chief baron to this effect, signed by the infant, with a consent of the person who is to be *prochein amy* subscribed to it, and an affidavit of the signatures of the infant and *prochein amy*, being laid before a judge, he will grant his fiat for a rule accordingly, and the rule will then be drawn up as in ordinary cases, on production of the fiat. *See the forms of petition, consent, fiat, &c. in the Appendix.* Let a copy of this rule be annexed to the declaration, when it is delivered, &c. This rule is confined to the action or actions specified in it, and is not to be deemed an authority to prosecute in any other action. *R. G. H. W. 4, s. 2.*

An infant may also sue by guardian; but this is not very usual in practice. He cannot however sue in his own right by attorney; if he do, the defendant may plead this matter in abatement. *2 Saund. 212 a (n. 5).* Formerly, if an infant sued by attorney, it was error, and it might be assigned either by the plaintiff or defendant; but this has been altered by stat. 21 Jac. 1, c. 13, s. 2, and 4 Ann. c. 16, s. 2, and now an infant plaintiff can have no advantage of his irregularity in suing by attorney. *Finley v. Jowle*, 13 *East*, 6. An infant so cannot sue in person; and hence it is that he cannot sue as a common informer; for a common informer, by stat. 18 El.

5, must sue either in person or by attorney, *Maggs v. His Bull*, N. P. 196.

After an infant has sued by *prochein amy* or guardian, he cannot remove the latter, or disavow the action of the former, *itz. N. B. 63 h*, without the leave of the court. *Goodwin v. Moore*, Cro. Car. 161. On the other hand, where the *prochein amy* was an uncertificated bankrupt, the court, upon motion by the defendant, removed him, and ordered another to be appointed in his stead. *Watson v. Frazer*, 8 *Mees. & W.* 660.

If the plaintiff be nonsuit, or judgment be otherwise given against him, the defendant may have his remedy by attachment against the *prochein amy* or guardian for the costs. *Evans v. Lewis*, 1 *Crompt. & J.* 460, and see *Price v. Duggan*, 1 *Dowl. C.* 709. It is doubtful perhaps whether he can take the infant in execution for them; *Dow v. Clarke*, 1 *Cr. & M.* 860; but if he do, the court will not in general interfere to relieve him, either he have sued by *prochein amy*, &c. *Gardiner v. Holt*, Str. 1217. *Dow v. Clark*, *supra*, or by attorney. *Finley Jowle*, 13 *East*, 6. As to the liability of the *prochein amy* or guardian to the plaintiff's attorney, for the amount of his costs, see *Marnell v. Pickmore*, 2 *Esp.* 473.

The court will not oblige an infant, who sues by *prochein amy*, to give security for costs; they have refused to do so, even where it was sworn that the *prochein amy* was insolvent. *Worth v. Mitchell*, 2 *D. & R.* 423.

SECTION II.

Actions, &c. against infants.

An infant must defend by guardian, *Co. Lit.* 125, b. 3 *Saund.* 117, f, even although he be sued in *exce. droit*. *Fraser v. Kinaston*, 2 *Str.* 783. *Hindmarsh v. Chandler*, 7 *Tent.* 488. If he appear by attorney, and judgment be given against him, it will be error: 2 *Saund.* 212, a. (n. 4) and see *Brown v. Cheshire*, 3 *Dowl.* 70; or if several defendants appear by attorney, and one of them be an infant, it will be error, and the judgment shall be reversed as to all; *Id.*; but if judgment be given for the infant, error will not lie. *Bird v. Pegg*, 5 *B. & A.* 414. In order to prevent this, the plaintiff may obtain a rule or writ for striking out the appearance by attorney, and that the defendant may appear by guardian within a certain time, or that in default thereof the plaintiff may be at liberty to name a guardian to appear and defend for him. 2 *Saund.* 117, f. *Gladman v. Bateman, Barnes*, 418. The court have entertained this application, even after the record was made up for trial; *Shipman v. Stevens*, 2 *Wils.* 50; and, in ejectment, *Goodright v. Wright*. 1 *Str.* 32, although not in other actions, *Poeper v. Jones*, 1 *Str.* 445, even after error brought. A similar order may also be obtained, where an infant defendant neglects to appear at all. *Stone v. Atwell*, 2 *Str.* 1076.

If an attorney undertake to appear for an infant, the court will compel him to do it properly; and if he appear by attorney, they will make him alter it, and enter an appearance by guardian. *Stratton v. Burgess*, 1 *Str.* 114.

In a non-bailable action, the plaintiff cannot enter an appearance for the defendant; if he do, the court will set it aside, even after a writ of enquiry has been executed and final judgment signed. *Nunn v. Curtis*, 4 *Dowl.* 729.

The guardian is appointed upon petition, in precisely the same way as a *prochein amy*; see *ante*, p. 205; and see the forms of the petition, consent, affidavit, fiat, and rule, in the Appendix; let the rule be annexed to the plea when delivered. The guardian, by consenting to defend for the infant, makes himself liable to the defendant's attorney for the costs of the defence, whether he interfere or not in the conduct of the action. *Marnell v. Pickmore*, 2 *Esp.* 473.

Where an infant defendant was taken in execution for the damages and costs in an action of slander, the court refused to discharge him, saying that they had no jurisdiction to do so; it appeared that he had applied to the insolvent court to be discharged, but without success, for as he was an infant he could not execute the necessary warrant of attorney; but the

court held that this made no difference. *Defries v. Davis*, 1 Bing, N. C. 692, 3 Dowl. 629, 1 Hedg. 108.

Warrant of attorney.] The warrant of an attorney of an infant is absolutely void; and where he gave it, with a perfect knowledge of the law in that respect, and in collusion with another person, the court felt themselves bound to order it to be delivered up to be cancelled. *Saunderson v. Marr*, 1 H. Bl. 75. But in such a case, where it appears that any thing like fraud or deception has been practised on the plaintiff, the court will require very strong and convincing proof of the infancy; otherwise they will not interfere. *Weaver v. Stokes*, 1 Mees. & W. 303. Where an infant joins an adult in a warrant of attorney, it is void only as against the infant, and not as against the other. *Matteus v. St. Aubin*, 2 W. Bl. 1133.

CHAPTER X.

Proceedings by and against Insolvents.

That part of the lord's act which enabled prisoners to petition for their discharge to the courts of law at Westminster, is repealed by stat. 1 W. 4, c. 10; and what was termed the compulsive clause of the lord's act, was repealed by stat. 1 & 2 Vict. c. 110, s. 119. The only proceeding at present, by an insolvent, which may be had in the courts at Westminster, is the application to be discharged out of custody, under stat. 48 G. 3, c. 123, which we shall now consider.

1. *Discharge under stat. 48 G. 3, c. 123.*

By stat. 48 G. 3, c. 123, s. 1, all persons in execution upon any judgment, in whatsoever court the same may have been obtained, for any debt or damages not exceeding 20*l.*, exclusive of costs, and who shall have lain in prison for the space of twelve successive calendar months next before the time of their application, shall, upon application for that purpose in term time, made to some of His Majesty's courts at Westminster, to the satisfaction of such court, be forthwith discharged out of custody as to such execution, by the rule or order of such court.

Where the debt for which the prisoner was in execution was exactly 20*l.*, he was holden to be entitled to his discharge, *Thompson v. King*, 4 Dowl. 582. So, where in debt the judgment was for 20*l.*, the debt, and one shilling nominal damages,

Patteson, J. held it to be within the act, and discharged the defendant. *Fogarty v. Smith*, 4 Dowl. 595, 1 Har. & W. 644. So, where the judgment was for 100*l.*, but the real debt due was only 18*l.* 10*s.* and for which latter sum alone the defendant was in execution, Parke, B. held it to be a case within the act, and discharged the defendant. *Harris v. Parker*, 3 Dowl. 451. But where the action had been brought on a promissory note of the defendant for 18*l.*, and upon judgment by default the master computed the principal and interest at 21*l.*, for which sum and costs, making together 42*l.*, the defendant was in execution: the court held that as the debt and damages exceeded 20*l.*, they had no power to interfere. *Cooper v. Bliss*, 2 Dowl. 749. and see *Curtis v. Richards*, 9 Dowl. 845. So, where a warrant of attorney is given for the amount of debt and costs, the sum for which the warrant of attorney is given will be deemed a debt within the meaning of this act, and if that sum exceed 20*l.*, the defendant will not be entitled to be discharged. *Robinson v. Sundell*, 6 Moore, 287. ——— v. *White*, 1 Dowl. 19. But a cognovit for debt and costs has a different effect; there, although the debt and costs exceed 20*l.*, yet if the debt were under 20*l.*, the party would be entitled to his discharge under this act. *Rathbone v. Fowler*, 3 Mees. & W. 137. So, a party in custody under an attachment for non-payment of costs, is not within the act, for he is not in execution upon a judgment. *R. v. Cliford*, 8 D. & R. 58. *Pitt v. Evans*, 3 Dowl. 649. *Doe v. Benson*, 1 Dowl. 15. and see *R. v. Dunne*, 2 M. & S. 201. But the statute is not confined to debts, or to damages in actions on contracts, but extends to judgments in all personal actions. Where the defendant was in execution for damages in an action for criminal conversation not exceeding 20*l.*, the court held it to be a case within the statute, and discharged him. *Goodfellow v. Robings*, 3 Bing. N. C. 1. And the same in an action for an assault. *Winter v. Elliot*, 3 Nev. & M. 315. So, in trover for a barge, where the verdict was for 90*l.* damages, to be reduced to 40*s.* if the barge should be given up, and the barge was accordingly given up, and the defendant was in execution for 40*s.* only and costs, Williams, J. held it to be a case within the act. *Smith v. Preston*, 2 Har. & W. 93. So, a defendant in execution for nominal damages, and costs, in an ejectment, is within the act, and may be discharged, *Doe v. Ward*, 2 Mees. & W. 65, although the property recovered be of greater value than 20*l.*, *Doe v. ———*, 1 Dowl. 69. See *Doe v. Reynolds*, 10 B. & C. 481 *cont.*, and although the costs may much exceed that sum. *Doe v. Sinclair et al.*, 3 Bing. N. C. 778. So, a plaintiff in execution for the costs of a nonsuit, may be discharged under this statute, *Roylance v. Hewling*, 3 M. & S. 282, if such costs do not exceed 20*l.* *Tinmouth v. Taylor*, 10 B. & C. 114. But it is a decisive objection that the prisoner is residing within the

rules of the prison,* and not within the walls; *Sumption v. Monzani*, MS. E. 1836. *B. R. Gilbert v. Pape*, 2 *Mees. & W.* 311; and it must be a year's imprisonment within the walls, immediately before the application, *Stubbing v. M'Grath*, 7 *Dowl.* 328, without an interval; *Effe v. Jacob*, 9 *Dowl.* 345; but merely being out on day rules during the year, is no objection. *Bouhey v. Webb*, 4 *Dowl.* 320.

The motion can only be made during term; *Short v. Williams*, 4 *Dowl.* 357; and upon the application of the party, and not of any third person. *Wood v. Heath*, 12 *Law J.* 16, *cp.* And it must be made in court; even where a defendant applied that the rule should be drawn up to show cause at chambers, the court held that they had no power by the statute to do so. *Jones v. Fitzadams*, 1 *Cr. & M.* 855. *Kelly v. Dickenson*, 1 *Dowl.* 546. The rule is either a rule *nisi*, *Id.* *Moore v. Clay*, 4 *Dowl.* 5. *Ex p. Ngilson*, 7 *Taunt.* 37. *Magnay v. Gilks*, *Id.* 467, in which case the rule must be served in the same way as the notice hereinafter mentioned; *Bottom et al. v. Allen*, 1 *Dowl. N. C.* 309; or it may be "absolute in the first instance, on an affidavit of notice given ten days before the intended application; which notice may be given before the year expires." *R. G. H.* 2 *W.* 4, s. 90. and see *Davies v. Rogers*, 2 *B. & C.* 804. This notice must be served upon the plaintiff; *Kelly v. Dickenson*, 1 *Dowl.* 546. *Gordon v. Twine*, 4 *Dowl.* 560; or, if it be not known where he is to be found, then upon his attorney. *Wilson v. Mockler*, 1 *Dowl.* 549. *Minshull v. Soane*, 8 *Law J.* 44, *ex. but see* *Chaster v. Youlden*, 10 *Id.* 357, *qb.* If there be two or more plaintiffs, service upon any one of them will be sufficient. *Harris et al. v. Turtle*, 8 *Mees. & W.* 258. *Faulkner et al. v. Haslar*, 9 *Dowl.* 138. So, if there be two or more lessors of plaintiff in ejectment, service on that one claiming the property will be sufficient. *Doe v. Peyton*, 7 *Dowl.* 671. Where the affidavit stated that it was served upon a female at the residence of the plaintiff, it was holden bad; *George v. Fry*, 4 *Dowl.* 273; and the same, where it was served on a servant of the landlord of the house where the plaintiff lodged. *Biddulph v. Gray*, 5 *Dowl.* 406. Where the plaintiff was dead, and the notice was served upon his attorney, *Littledale, J.* held it to be insufficient, as it ought in such a case to be served on the plaintiff's personal representative; but on a subsequent day, it appearing that the plaintiff had died intestate, leaving a widow only, who did not take out administration, his lordship granted a rule *nisi*, to be served on the widow and on the attorney, which was afterwards made absolute in the ordinary way. *Ex p. Richer*, 4 *Dowl.* 276, 1 *Har. & W.* 518. But where the party was in execution merely for the costs of a nonsuit, a service of the notice on the defendant's attorney was holden sufficient, it being sworn that the

applicant did not know the defendant or where he lived. *Bradley v. Webb*, 7 Dowl. 588. This notice must be given, not merely ten days before the application is actually made, but ten days before the time mentioned in the notice for the application. *Bolton et al. v. Allen*, 1 Dowl. N. C. 309. Care must be taken that the notice be intitled correctly in the cause. *Kelly v. Dickinson*, 1 Dowl. 546. See the Form of the notice, *Arch. Forms*, 497. It is customary, upon serving the notice, to leave also a copy of the affidavits on which it is intended to move; but this is not necessary. *Wilcox v. Lamm*, 8 Dowl. 144.

If the prisoner be in execution in an action in any of the courts at Westminster, the application should be made to that court; but if the action be in some other court, the application may be made to any of the courts of law at Westminster the prisoner may think proper. Besides an affidavit of the service of the notice as above mentioned, the court of Common Pleas require an affidavit of the prisoner's signature to it. *Randall v. Sweet et al.*, 10 Law J. 132, *cp.* There must also be an affidavit of the facts bringing the case within the statute, (see the form, in the Appendix), a copy of causes from the keeper of the prison in which he is in custody, and (if not in custody of the marshal or warden) an affidavit of the gaoler's signature to it. In opposing the discharge the plaintiff will be confined strictly to the controverting the facts stated in the first section of the statute, *ante*, p. 207, and to showing that the prisoner does not come within the meaning of the statute. *Baxter v. Clark*, 2 Cr. M. & R. 734. Where the rule is not a rule nisi, if cause be shown against it upon the notice, and the rule be refused, the court never grant costs against the prisoner. *Anon.* 1 Dowl. 148.

It may be necessary to mention that the day on which the party was taken or charged in execution, and the day on which he applies, are both reckoned inclusive in the twelve months; as if he be taken or charged in execution on the 26th of November, he may move to be discharged on the 25th of November following. *Anon.* 1 Dowl. 150. *Porkers v. Wilkins*, 7 Dowl. 152.

His discharge under this act, does not affect any proceeding against him, which may be pending in the insolvent court; *Kitching v. Croft et al.*, 12 Ad. & El. 586; nor, on the other hand, is his right to apply under this act affected by the 41st section of the insolvent act, 1 & 2 Vict. c. 110. *Chew v. Lee* 5 Mees. & W. 388.

2. Action by an insolvent.

If a person who has been discharged under the insolvent act, commence an action for debt or other cause of action accruing

assignees, and which passed or ought to have vested in assignee, the defendant may plead the plaintiff's discharge, although the action be brought for the benefit of the . So, if after action brought, the plaintiff be discharged the insolvent act, the defendant may plead the insolvent act in bar of the further maintenance of the action, and the plaintiff cannot reply that the action is continued by the assignees and for the benefit of his assignees. *Swann v. Sutton*, 10 C. & El. 623.

3. *Action against an insolvent.*

no suit or action be brought against a person who has been discharged under the insolvent act, or against his heirs, executors or administrators, for any debt, or sum of money, the cause of action included in his schedule, or upon any new contract or security for the payment thereof, the defendant cannot plead the discharge in bar. 1 & 2 Vict. c. 110, s. 91. See *Nisi Prius*, 101. and see the form of the plea and the verdict. *Id.* 102, 103.

By 1 & 2 Vict. c. 110, s. 90, no person who shall have become entitled to the benefit of this act by any such adjudication as aforesaid, shall at any time hereafter be imprisoned or by reason of any debt or sum of money, or costs, with interest of which such person shall have become so entitled, or by reason of any judgment, decree or order for payment of the same; but that upon every arrest or detainer in prison by reason of any such debt or sum of money or costs, judgment, decree or order for payment of the same, it shall be lawful for any judge of the court from which any such writ shall have issued in respect thereof, and such judge is required, upon proof made to his satisfaction that the cause of such arrest or detainer is such as hereinbefore mentioned, to release such prisoner from custody, unless it shall appear to such judge, upon inquiry, that such adjudication as aforesaid was made without due notice, when notice is by this act required, being given to or acknowledged by the plaintiff in the process, or being by him dispensed with by an acceptance of a dividend under this act or otherwise; and at the time, if such judge shall in his discretion think fit, it shall be lawful for him to order such plaintiff, or any person claiming to sue out such process, to pay such prisoner the costs which he shall have incurred on such occasion, or so much thereof as to such judge shall seem just and reasonable, such prisoner causing a common appearance to be entered for such action or suit."

By sect. 91 of the same act, "after any person shall have become entitled to the benefit of this act by any such

adjudication as aforesaid, no writ of *hæri facias* or *elegit* shall issue on any judgment obtained against such prisoner, for any debt or sum of money, with respect to which such person shall have so become entitled, nor in any action upon any new contract or security for payment thereof." Where, upon a *ca. sa.* against four defendants, one was arrested, and was afterwards discharged under the insolvent act: a writ of *hæri facias* then issued against the four, under which a horse of the insolvent was seized: the court held the writ to be irregular, and set it aside with costs; and they inclined to think that as the statute enacts that no writ of *hæ. fa.* should issue against the insolvent, the proper mode of proceeding would have been to have entered a suggestion of the insolvency, and have issued the *hæ. fa.* against the remaining three defendants. *Raynes et al. v. Jones et al.*, 9 Mees. & W. 104.

CHAPTER XII.

Actions against Justices of Peace, Constables, &c.

SECTION I.

Action against justices.

In what cases an action will lie against a justice of peace, for any thing done by him in the execution of his office, see *Arch. J. P. vol. 2, p. 36*. The proceedings in such actions are very often regulated by the particular statutes under which the magistrate has acted upon the occasion; but there are some general regulations upon the subject, which, in the absence of any particular enactments above alluded to, must be attended to, and which shall now be detailed.

Limitation of action.] The action must be commenced within six calendar months. 24 G. 2, c. 24, s. 8. See *Hardy v. Ryle*, 8 B. & C. 603. Where the cause of action is a continuing one, by imprisonment, the action may be brought within six calendar months after the last day of imprisonment. *Id. Massey v. Johnson*, 12 East, 67, and see *Weston v. Pournier*, 14 East, 491.

Notice of action.] Notice of the intended writ shall be delivered to the justice, or left for him at his usual place of abode, by the attorney or agent of the party, at least one calendar month, [*See Rix v. Borton et al.*, 12 Ad. & El. 470,] before

ich writ shall be sued out; "in which notice shall be clearly and explicitly contained the cause of action which such party hath or claimeth to have against such justices of the peace, and on the back of which notice shall be indorsed the name of such attorney or agent, together with the place of abode;" 4 G. 2, c. 24, s. 1, *see also* 5 & 6 Vict. c. 97, s. 4; which month is reckoned exclusive both of the day of giving the notice, and the day of commencing the action. *Young v. Higgon*, 8 Dowl. 212, 9 Law J., 29, m. And the plaintiff shall not recover a verdict, unless he prove upon the trial that such notice was given; and in default of such proof, such justice shall recover a verdict and costs. *Id.* s. 3. Also, no evidence shall be given of any cause of action, except such as is contained in the notice. *Id.* s. 5. In all cases where a magistrate acts *bond fide* in what he conceives to be the execution of his duty as such, however mistaken he may be in the notion he forms of his jurisdiction, he is entitled to this notice, before an action is brought against him. *See Weller v. Toke*, 9 East, 364. *Prestige v. Woodman*, 1 B. & C. 12. *Jones v. Williams*, 1 Car. & P. 459, 669. *Briggs v. Evelyn*, 2 H. Bl. 114. But where the action was brought against him, for acting without a qualification, *Wright v. Horton*, Holt, N. P. C. 458, or for taking an illegal fee, *Morgan v. Palmer*, 2 B. & C. 729, or to recover goods retained by him by order of a judge of assize, *Licet v. Reid*, Peake, 35, he was holden not to be entitled to notice. And at the trial proof of the notice will be required, even although the magistrate may have tendered amends, accompanied with a paper writing reciting the notice, *Martins v. Upcher*, 1 Dowl. N. C. 555.

See the form of the notice, in the *Appendix*. Formerly it was holden that the notice must state what kind of writ is intended to be sued out; *Lovelace v. Curry*, 7 T. R. 631; but it may be doubted whether it would now be so decided, as no other but the writ of summons is applicable to such actions. The notice however must describe correctly the cause of action; *supra*; and any material variance may be fatal. *Aked v. Stocks*, Bing. 509. It need not however describe the form of action; *abin v. De Burg*, 2 Camp. 196; although if it do, and state incorrectly, the variance will be fatal. *Strickland v. Ward*, T. R. 631 n. Also, it is not necessary to name all the parties intended to be included in the action. *Baz v. Jones*, 5 vice, 168. The statute requires the notice to be indorsed with the name, &c. of the party's attorney, or agent; but if the name and place of abode of the attorney, instead of being indorsed on the notice, be on the face of it, *Crooke v. Curry*, Burn's Just. D. & W. 70, or if the christian name of the attorney be described by the initial only, *James v. Swift*, 4 B. & C. 681. *Mayhew v. Locke*, 7 Taunt. 63, it will be sufficient. Also if, instead of stating the place of abode of the attorney,

it state his place of business, it will be sufficient. *Roberts v. Williams*, 4 Dowl. 486. Describing the attorney as "of Birmingham," has been holden sufficient. *Osborn v. Gough*, 3 B. & P. 551. But "given under my hand at Durham," has been holden insufficient, for the attorney might have his abode or place of business elsewhere. *Taylor v. Fenwick*, 3 B. & P. 553 n. So, a description of an attorney as of a place in "London," when the place in fact was in Westminster, was holden bad. *Stears v. Smith*, 6 Esp. 138.

Venue, plea, &c.] The venue must be laid in the county where the act complained of was committed; otherwise the defendant shall have a verdict. 21 Jac. 1, c. 12, s. 5.

The defendant may plead the general issue, "not guilty," and give the special matter in evidence. 7 Jac. 1, c. 5. 21 Jac. 1, c. 12, s. 5. See 3 & 4 W. 4, c. 42, s. 1. But in the margin of the plea, must be inserted the words "by statute," otherwise it shall not be taken to have been pleaded by virtue of the statute. R. G. T. 1 Vict.

The defendant may tender amends, within one month after action brought, and if not accepted he may plead the tender, together with the plea of "not guilty." 24 G. 2, c. 44, s. 2. Or if he have neglected to tender amends, he may, by leave of the court, at any time before issue joined, pay money into court. *Id.* s. 3. See R. G. H. 4 W. 4, r. 1, ss. 17, 18, 19, and see *Casbourn v. Ball*, 2 W. Bl. 859. Even after issue joined, the court have allowed the defendant to withdraw his plea, pay money into court, and plead *de novo*. *Nestor v. Newcome*, 3 B. & C. 159. *Devaynes v. Boys*, 7 Taunt. 33.

If after a conviction quashed, the party convicted bring an action against the justice, he shall not recover more than 2*l.* damages or any costs, unless the declaration allege the act to have been done maliciously, and without reasonable or probable cause; 43 G. 3, c. 141, s. 1. See *Jones v. Gurdon*, 11 Law J., 45 m; nor shall he recover the amount of any penalty levied, or any damages or costs, if the defendant prove that he was really guilty of the offence, &c. *Id.* s. 2. See *Rogers v. Jones*, 5 D. & R. 268. *Gray v. Cookson*, 16 East, 13. In all other cases, the plaintiff, if he recover, is entitled to costs; and if the judge in open court certify that the act complained of was done "wilfully and maliciously," 24 G. 2, c. 44, s. 7, the plaintiff shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in or about such action or suit, or other legal proceeding, as shall be taxed by the proper officer in that behalf, subject to review as in ordinary cases. 5 & 6 Vict. c. 97, s. 2. And the defendant, if he have a verdict or the plaintiff be nonsuit, &c., shall [upon a certificate of the judge at nisi prius, *Qu. see Penny v. Slade & al.*, 5 Bing. N. C. 469,] also be entitled to the like. 7 Jac. 1,

1 *Jac.* 1, c. 12; 5 & 6 *Vict.* c. 97, s. 2, and see 24 *G.* 2.
2. *Harper v. Carr*, 7 *T. R.* 448. *Thomas v. Saunders*,
E. 552. *Fosbrooke v. Holt*, 1 *Mees. & W.* 205.

SECTION II.

Actions against constables.

When an action shall be brought against a constable or any person acting in his aid, for any thing done by him in obedience to a justice's warrant, a demand in writing of a perusal of the warrant, signed by the party, must first be made; and if not given within six days, the plaintiff may bring an action against the constable alone; but if given, the plaintiff must make the justice a party, otherwise the constable, on the warrant at the trial, shall have a verdict. 24 *G.* 2, 6. And giving a copy of the warrant, but not a perusal of the original, that being in the hands of the gaoler, has been deemed sufficient. *Atkins v. Kilby & Wyatt*, 9 *Law J.*, 100. If the plaintiff make the justice a party, then at the trial, on proof of the warrant, the constable shall have a verdict; but if a verdict be given against the justice, the latter may sue the plaintiff, not only his costs of the action, but also the costs he may be obliged to pay the constable. *Id.* 100. *Atkins v. Wiltshire*, 5 *Moore*, 322. *Barrons v. Luscombe*, 1 *W.* 457. *Price v. Messenger*, 2 *B. & P.* 158. *Jones v. Han*, 5 *East*, 445. *Bell v. Oakley*, 2 *M. & S.* 259. *Green*, 5 *East*, 233. But this statute applies only to cases where the injured party can maintain an action against the constable. *Sly v. Stevenson*, 2 *Car. & P.* 464. *Cotton v. Nev.* & *M.* 399.

Costs in actions against the metropolitan police, see *Py v. Woodhouse*, 3 *Dowl.* 416. 1 *Bing. N. C.* 506; and police appointed under the municipal corporation of *Barley v. Titterton*, 10 *Law J.*, 172, *ex.*

CHAPTER XIII.

Actions by Paupers.

[*action to sue.*] A person will be admitted to sue, or to bring a suit, *in forma pauperis*, if he will obtain a certificate from the magistrate that he has a good cause of action, and will swear an affidavit that he is not worth 5*l.*, except his wearing

apparel and the matter in question. It was at one time holden by the court of Exchequer, that a plaintiff could not be admitted in *formâ pauperis* after the commencement of the suit; *Foss v. Racine et al.*, 4 *Mees. & W.* 610. *Lovewell v. Curtis*, 5 *Id.* 158; the point was afterwards doubted; *Casey v. Tomlin*, 7 *Mees. & W.* 189; but it is now fully settled that he may, not only by the courts of Queen's Bench, *Pitcher v. Roberts*, 12 *Law J.*, 178, *qb.*, and see *Morgan v. Eastwick*, 7 *Dowl.* 543, and Common pleas, *Brunt v. Wardell*, 1 *Dowl. N. C.* 229, *cp.*, but also by the court of Exchequer. *Doe v. Owens*, 1 *Dowl. N. C.* 404, 12 *Law J.*, 53, *ex.* The proceeding for this purpose is by petition to the chief justice or chief baron of the court; see the form of the petition, certificate of counsel, and affidavit of the plaintiff's poverty in the Appendix. Take these to the judge's clerk, and he will make out the order; you must then annex a copy of the order to the declaration, or to the first proceeding after the order has been obtained. The order itself, when produced at the offices of the court, will excuse the plaintiff from the payment of fees. The proceedings in the cause, of course, are the same as in ordinary cases.

It is not however in every case that the judge will grant an order. It has been refused in a second action of ejectment, for the same premises, on the same title; *Goodtitle v. Mayo*, 1 *Tidd*, 94; and would probably be refused in all vexatious actions. And a person will not be admitted to defend an action in *formâ pauperis*, in any case. See *R. v. Pearson*, 2 *Burr.* 1039.

In what cases dispaupered.] If a person who has been admitted to sue in *formâ pauperis*, be guilty of any vexatious delay in the conduct of his cause, the court upon application will dispauper him; but they will not oblige him to pay costs. *Doe v. Trussell*, 6 *East*, 505. Afterwards, he will be as liable for costs subsequently incurred, as any other plaintiff. Where such an application was made after judgment as in case of non-suit, Bayley, J., held that it could not be granted; for by the judgment the action was already at an end. *Gale v. Leckie*, 6 *M. & S.* 228.

Costs.] The plaintiff's counsel and attorney, and the officers of the court, shall act for him *gratis*; 11 *H.* 7, *c.* 12; but their fees shall be paid afterwards, out of the produce of the action, if the plaintiff recover. Also, he is not obliged to pay costs to the defendant, *Rice v. Brown*, 1 *B. & P.* 39. *Blood v. Lea*, 3 *Wils.* 24, interlocutory, *Pratt v. Delarue*, 12 *Law J.*, 25, *ex.*, or final, except in one case, by *R. G. H.* 2 *W.* 4, *s.* 110, by which it is ordered that "where a pauper omits to proceed to trial, pursuant to notice or an undertaking, he may be called upon by a rule to show cause why he should not pay costs,

though he has not been dispaupered." See *Gore v. Morphey*, 8 Dowl. 137. *Doe v. Edwards*, 2 Dowl. 471. The rule is a rule nisi only. *S. C. Id.* 468.

The plaintiff however is entitled to costs, if he succeed. Where an action for false imprisonment was brought by a plaintiff in *forma pauperis*, against six defendants, and the declaration contained four counts; at the trial the plaintiff recovered against three of the defendants only, on one of the counts: the court held that the defendants acquitted were not entitled to costs; that the plaintiff was entitled to his full costs on the one count on which he had a verdict, and that the defendants were not entitled to have their costs on the other counts, on which they succeeded, deducted. *Gougenheim v. Lane et al.*, 1 Mees. & W. 136. *Foss v. Racine et al.*, 4 Mees. & W. 610.

CHAPTER XIV.

Actions against peers and members of parliament.

Actions against.] The present mode of proceeding against any person having "privilege of peerage or of parliament," is the same as against all other persons in ordinary actions, namely, by writs of summons and *distringas*; 2 W. 4, c. 39, s. 1; and the court have refused to set aside a *distringas* against a peer, although it was stated upon affidavit that he was abroad, where it was a *distringas* to compel an appearance, *Houlditch v. Earl of Lichfield*, 12 Law J., 80, *cp.*, and not for the purpose of outlawry. And the process, &c., need not describe them as having privilege of parliament. See *Everett v. Wharton*, 5 M. & S. 321. They have still, however, the privilege from arrest, see *Coates v. Ld. Hawarden*, 7 B. & C. 388, and 2 W. 4, c. 39, s. 19, 4, even after judgment; see *ante*, vol. 1, p. 133, and see *Digby v. Alexander*, 1 Dowl. 713; and they cannot be outlawed. *Cassidy v. Stewart*, 10 Law J., 57, *cp.* 9 Dowl. 366.

Attachment.] A peer, *Walker v. Ld. Grosvenor*, 7 T. R. 171, and *post*, p. 305, or member of the house of commons, *Catmur v. Knatchbull*, 7 T. R. 448, cannot be arrested upon, or proceeded against by, attachment, for non-payment of money; for the attachment in such a case is in the nature of civil process. But in other cases, it seems, he is liable to an attachment. *R. v. Bp. of St. Asaph*, 1 Wils. 332.

Under the bankrupt Act.] By stat. 6 G. 4, c. 16, s. 10, Where a member of parliament, subject to the bankrupt laws,
VOL. II.

is indebted to any creditor or creditors, to such an amount as is requisite to support a commission,—if such creditor or creditors shall make an affidavit of debt, and serve the defendant with a summons, &c., as directed by the statute, the defendant must then, within one calendar month, pay or compound the debt to the satisfaction of his creditors,—or enter an appearance to the action, and give a bond with two sureties for the payment of any sum that may be recovered against him, with costs: otherwise such member of parliament shall be deemed to have committed an act of bankruptcy, and a fiat may be sued out against him. *See Hunter v. Campbell*, 3 B. & A. 273. and see *Arch. Forms*, 462. The form of the process is given by stat. 2 W. 4, c. 39, s. 9, and Sch. No. 6.

CHAPTER XV.

Proceedings by and against Prisoners.

SECTION I.

Actions against them.

Process.] In ordinary actions against prisoners, where they are not holden to bail, the proceedings are the same as in actions against persons not in custody; except merely as to the mode of charging them in execution, which is the same of course as in actions against prisoners who have been holden to bail. We shall therefore confine our attention to those cases in which a prisoner has been holden to bail, namely, where a judge's order for a *capias* against him has been obtained, or where the prisoner has been remanded by the insolvent court, as shall be mentioned presently.

Where the defendant is in custody of the sheriff, you must serve him with a writ of summons, as in ordinary cases. And if you obtain a judge's order to sue out a *capias* against him, as mentioned in vol. 1, p. 125, &c., *sue it out, take it to the sheriff's office, and obtain a warrant of detainer upon it, directed to the officer or gaoler in whose custody the defendant is, who will thereupon detain him at the plaintiff's suit.* Or where the defendant has been adjudged by the insolvent court to be discharged at some future time, the person or persons at whose suit he is so to be discharged, may charge him in custody in like manner as before the passing of stat. 1 & 2 Vict. c. 110; *Id.* s. 85; that is to say, he may make an affidavit of debt, in the ordinary form, *Bilton v. Clapperton*, 9

Mees. & W. 473, and, without obtaining any judge's order for the purpose, may sue out a *capias*, obtain a warrant upon it, and lodge it with the gaoler in whose custody he is, as above mentioned. *Id. and Turner v. Darnell*, 5 *Mees. & W.* 28. And if the remand be general, any of the creditors whose debt amounts to 20*l.* can hold the prisoner thus to bail, and have him detained. Where the prisoner is thus remanded, it is not necessary to serve him with a writ of summons, because the *capias* is process in the action.

If the defendant be in custody in the Queen's prison, and you obtain a judge's order to hold him to bail, although you cannot have him detained by writ of *capias*, for that writ must by stat. 1 & 2 Vict. c. 110, be directed to the sheriff, and cannot be directed to the keeper of the Queen's prison, *Edwards v. Robertson*, 5 *Mees. & W.* 520, yet you may sue out a writ of detainer against him, and lodge it with the keeper, such being the constant practice at present. The statute, it is true, gives the form of a *capias* only; but as the judge, according to the 3rd section of the statute (*see vol. 1, p. 125*), has a general authority to order the defendant to be holden to bail, whether he be at large or in custody, it is quite consistent with the statute that the plaintiff may thereupon sue out a writ of detainer against the defendant if in custody, the writ of *capias* being intended to apply only to cases where the defendant is to be arrested. As the writ of detainer, however in this case, is not in strictness process in the action, but a collateral proceeding, it will be necessary also to serve the defendant with a writ of summons. Also if the defendant have been adjudged by the insolvent court to be discharged at some future time, then inasmuch as by stat. 1 & 2 Vict. c. 110, s. 85, the person or persons, at whose suit he is to be so discharged, may charge him in custody in like manner as before that act was passed, such person may now sue out a writ of detainer against such debtor, directed to the keeper of the Queen's prison, in the same manner as formerly. *See ante, p. 218*. In this latter case, it is not necessary to serve the defendant with a writ of summons, because the writ of detainer is process in the action. By stat. 2 W. 4, c. 39, s. 8, the process of detainer shall be according to the form of the writ of detainer contained in the schedule to that Act, and marked No. 5. *In order to sue out the writ, first make an affidavit of debt, as directed ante, vol. 1, p. 420, omitting, in cases where the defendant has been remanded by the insolvent court, that part which states that the defendant is about to leave the country; then get a blank form of the writ on parchment, and a printed copy on paper, at the stationer's; fill them up carefully, and indorse them in the manner mentioned in the Appendix. Then take the writ, with a præcipe as directed ante, vol. 1, p. 157, to the proper officer, and get it signed, and then*

sealed; and then leave the writ and copy with the keeper of the prison to whom it is directed. By stat. 2 W. 4, c. 39, s. 8, "a copy of such process and of all indorsements thereon, shall be delivered, together with such process, to the [keeper of the Queen's prison] to whom the same shall be directed, and who shall forthwith serve such copy upon the defendant personally, or leave the same at his room, lodging, or other place of abode." Where the sum for which the defendant was to be detained, was not indorsed on the writ, the writ on this account was set aside for irregularity. *Jones v. Price*, 2 Dowl. 410.

The statute (2 W. 4, c. 39, s. 8) says, that "such process may issue from either of the said courts;" that is to say, from any of the courts of common law at Westminster.

If the defendant is in custody of the sheriff on a criminal account, there is no objection to his being charged with a civil action, as above directed. *Grainger v. Moore*, 4 Dowl. 456. But if he be in the custody of the keeper of the Queen's prison, on a criminal charge, he cannot be charged with a civil action, without the leave of the court. Nor can he be charged with a civil action at all, if he be in custody for a crime in any other than the prison of the court or sheriff; and therefore where the party was in custody in the house of correction, the court refused a *habeas* to have him brought up to be charged with a civil action. *Brandon v. Davis*, 9 East, 154. But he may be charged with a civil action, if he be merely in custody under an attachment for non-payment of costs, or the like. *Bond-fous v. Schoole*, 4 T. R. 316.

Where he is wrongfully in custody, he cannot be charged with a civil action at the suit of the party who keeps him so in custody; see *Barlow v. Hall*, 2 Anst. 461; and see *White v. Gompertz*, 5 B. & A. 905. *Quin v. Reynolds*, 3 M. & S. 144; but if a detainer be lodged against him at the suit of a third party, without collusion with the first, the court will not interfere to relieve him from it. *Barclay v. Fabor*, 2 B. & A. 743. *Davis v. Chippendale*, 2 B. & P. 282. See more fully upon this subject, *ante*, vol. 1, p. 165.

Where the writ of detainer lodged with the marshal was irregular, and the plaintiff's attorney, upon perceiving his error, gave notice to the defendant and the marshal that he abandoned it, and he then sued out a fresh writ for the same cause of action: *Patteson, J.* held that he could not do so, and set aside both writs,—the first for the irregularity, and the other, because it was equivalent to a second arrest for the same cause. *Gadderer v. Sheppard*, 4 Dowl. 577.

Bail.] As to the mode of putting in and justifying bail for a prisoner, and at what period of the cause it may be done, see *ante*, vol. 1, p. 197.

Declaration.] Where the defendant has merely been served with a writ of summons, the plaintiff may declare against him in the same manner, and within the same time as if he were not in custody. *Boucher v. Roe*, 9 Dowl. 329. But "in all cases in which a defendant shall be detained in prison on any writ of *capias* or detainer under stat. 2 W. 4, c. 39, or, being arrested thereon, shall go to prison for want of bail; and in all cases in which he shall be rendered to prison before declaration on any such process: the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest or detainer, or render and notice thereof; otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering an appearance according to the form set forth in the aforesaid statute, 2 W. 4, c. 39, sch. No. 2, unless further time to declare shall have been given to such plaintiff, by rule of court or order of a judge," *R. G. T.*, 3 W. 4, R. 1. But if the defendant have given notice of his intention to petition the insolvent court for his discharge, *R. E.* 3 G. 4, K. B.; *R. M.* 3 G. 4, C. P., or if that court have made a vesting order, 1 & 2 Vict. c. 110, s. 41, it is not necessary to declare within this time, even although the action have been commenced after such notice or order. *Buzzard v. Boussfield*, 4 Mees. & W. 368. See post p. 230. Where the defendant was also in custody on a criminal charge, and sentenced to a certain period of imprisonment, it was holden that the plaintiff was not bound to declare against him during that time; *Altroffe v. Lunn*, 9 B. & C. 395; but it is prudent in such a case to obtain a judge's order for time to declare. On the other hand, by the terms of the writ of detainer, the plaintiff cannot declare until after eight days from the service of a copy of the writ, the day of the service being reckoned inclusive.

When the defendant is in custody in the action, the declaration may be written on plain paper, in the form given by *R. G. M.* 3 W. 4, s. 15, thus:

In the [&c.

The — day of — in the year of our Lord 1843.
[Venue] *John Nokes* by *E. F.* his attorney [or in his own proper person.] complains of *Joseph Styles*, being detained at the suit of *John Nokes* in the custody of the sheriff, [or the keeper of the Queen's prison]: For that whereas, &c., as in ordinary cases.

Make two copies of this declaration, and deliver one of them to the defendant, or (which is much more usual) leave it for him at the office of the keeper of the Queen's prison, or with the goaler or keeper of the sheriff's prison, &c. It is not necessary now, as formerly to have the prisoner brought up by

habeas, to be charged with the declaration. *Barnett v. Harris*, 2 Dougl. 186. *Millard v. Millman*, *Id.* 523; and see *Guiseppi v. Haynes*, 10 *Lanc. J.* 425 *ex.* And the declaration must be delivered in this way, even where the defendant has appeared by attorney. Formerly there were three copies made of the declaration; but by R. G. H. 2 W. 4, s. 36, "where the plaintiff declares against a prisoner, it shall not be necessary to make more than two copies of the declaration, of which one shall be served, and the other filed with an affidavit of service; upon the office copy of which affidavit a rule to plead may be given."

Plea, &c.] By R. G. T. 3 W. 4, r. 2, in all actions against prisoners in custody of the marshal, warden or sheriff, [or now, in custody of the keeper of the Queen's prison,] "the defendant shall plead to the declaration, at the same time, in the same manner, and under the same rules, as in actions against defendants who are not in custody."

First as to the notice to plead: this is endorsed on the copy of the declaration delivered, in the same manner as in ordinary cases; see *ante*, vol. 1, p. 280; but the omission of such indorsement is no ground for setting aside an interlocutory judgment, signed for want of a plea. *Clementson v. Williamson*, 1 *Bing. N. C.* 356. As to the time for pleading, see *ante*, vol. 1, p. 275.

Secondly, as to the rule to plead: it has been already mentioned (*ante*, p. 221), that two copies of the declaration are made, one of which is delivered to the defendant, or at the office of the keeper of the Queen's prison, for him. The other must be annexed to an affidavit of service, and filed with the officer who acts as clerk of the rules; he will then give you an office copy of the affidavit, with a rule to appear and plead indorsed upon it. Serve a copy of the rule on the prisoner, or on the turnkey of the prison for him, or at the office, &c. in the same manner as the declaration.

Thirdly, as to the demand of plea: In the Queen's Bench, formerly, a demand of plea was necessary in actions against prisoners in custody of the marshal; *Rose v. Christfield*, 1 *T. R.* 591, *per Buller, J.*; but not in actions against prisoners in custody of the sheriff. *Wilkinson v. Brown*, 6 *T. R.* 524. And the like in the Exchequer. In the Common Pleas, a demand of plea was not necessary in any case, whether the defendant were in the custody of the warden or sheriff. But as the pleading by prisoners is now to be "in the same manner and under the same rules" as in ordinary cases, (*vide supra*), it should seem that a demand of plea should now be given in all actions against prisoners; at least it will be prudent to do so, until the court shall decide to the contrary. It may be given on the back of the copy of the declaration delivered, as in ordinary cases. See *ante*, vol. 1, p. 281.

The plea is delivered to the plaintiff's attorney, as in ordinary cases.

The other pleadings, to issue, are the same as in ordinary cases. The issue also is the same as in ordinary cases in bailable actions, (*see ante*, vol. 1, p. 324), except that in the commencement, in cases where the *capias* or detainer is process in the action, instead of "summoned to answer," you say "detained in custody at the suit of." *See R. G. H. 4 W. 4, r. 2, sch. No. 1.* Notice of trial is also indorsed upon it, as in ordinary cases.

Trial or final judgment.] By *R. G. H. 2 W. 4, s. 85*, "the plaintiff shall proceed to trial or final judgment against a prisoner within three terms inclusive after declaration," unless the prisoner have given notice of his intention to petition the Insolvent Court for his discharge, *R. E. 3 G. 4, K. B.; R. M. 3 G. 4, C. P.*, or that court have made a vesting order of the prisoner's property. *1 Vict. c. 110, s. 41. See post, p. 230.* The words "final judgment," here mean a final judgment without trial, as after an interlocutory judgment for want of a plea; and not a judgment after verdict. *See Heaton v. Whittaker, 4 East, 349.* And where an action was against two prisoners, one of whom pleaded the general issue, and the other suffered judgment by default, the court held it sufficient for the plaintiff to have proceeded to trial within three terms against the prisoner who pleaded, although the costs were not taxed, nor final judgment signed against both, until after the third term. *Wriglesworth v. Wright, 13 East, 167.* So, where the defendant, after being served with declaration in Trinity term, escaped, and did not return into custody until the Hilary term following, the court refused to discharge him, although the plaintiff had not signed final judgment by the end of Hilary term. *Grimes v. Joseph, 2 Brod. & B. 35.*

As to proceeding to trial, it is holden that if the plaintiff give notice of trial for the third term inclusive, and set down his cause for trial in that term, he sufficiently complies with the above rule, although the cause be not tried during the term; for the delay in that case is not that of the plaintiff, but of the court. *Myers v. Cooper, 2 Dowl. 423.*

The notice of trial is the same as in ordinary cases. There is an old rule of the court of Common Pleas, requiring ten days' notice of trial in actions against prisoners in custody of the warden; *R. H. 14 & 15 C. 2*; but it is not observed in practice.

If the plaintiff do not proceed to trial or final judgment within three terms inclusive after declaration, within the meaning of the above rule, the defendant will be entitled to be discharged by *supersedeas*. He cannot apply for it, however, until the third term has expired. *Thomas v. Pritchard, 4 T. R. 664.*

The rule above mentioned makes no provision for the case where the defendant is not in custody at the time the declaration is delivered to him, but renders in discharge of his bail afterwards. By the practice of all the courts, before the above rule, the plaintiff in such a case was obliged to proceed to trial or final judgment within three terms inclusive after such render and notice thereof given. *R. H. 26 G. 3, K. B.*; *R. E. 8 G. 1, C. P.*

Execution.] By *R. G. H. 2 W. 4, s. 85*, after requiring that the plaintiff shall proceed to trial or final judgment within three terms after declaration, as above mentioned, it is ordered that he "shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment (*vide supra*), of which the term, in or after which the trial was had, shall be reckoned one;" but the plaintiff will not be bound to proceed to execution within this time, if the prisoner have given notice of his intention to apply to the Insolvent court for his discharge, *R. E. 3 G. 4, K. B.*; *R. M. 3 G. 4, C. P.*, or if that court have made a vesting order of his property. *1 & 2 Vict. c. 100, s. 41. See post, p. 230.* When the above rule was made, judgments had relation to the first day of the term in or after which they were signed; and therefore there was no necessity for making any provision in this rule for final judgments after judgment by default, &c. signed in vacation. But although judgments now have relation only to the day on which they are actually signed, (*see ante, p. 30*), it is very probable that the court would still hold, that when a judgment is signed in vacation, the previous term would be deemed one of the two terms within which the defendant must be charged in execution. *See Baxter v. Bailey, infra.* Such was the practice formerly in all the courts. It is clear from the rule, that where the cause is tried in vacation, the term previous to the trial is reckoned as one of the two; and that the plaintiff must charge the defendant in execution during the next term; *Foulkes v. Burgess, 2 Mees. & W. 849*; and this, even although the plaintiff may have proceeded to trial before he was bound to do so by the practice of the court. *Heaton v. Whittaker, 4 East. 349.*

There is no provision in this rule, for a case where the defendant surrenders after trial or final judgment. But by the practice of the courts previously to that rule, where the defendant rendered in discharge of his bail, after trial or final judgment, the plaintiff was bound to charge him in execution within two terms after the render and notice given, of which two terms the term of which the render was made was reckoned one; *R. H. 26 G. 3, K. B.*; *R. E. 8 G. 1, C. P.*; and a render in vacation was deemed a render of the previous term, so that the plaintiff in such a case was bound to charge the defendant in execution in the next term. *Per Lawrence, J. in*

Smith v. Jeffreys, 6 T. R. 776. *Neil v. Lovelace*, 8 Taunt. 674. *Russell v. Stewart*, 3 Burr. 1787. *Laidler v. Elliott*, 3 B. & C. 138. And such is still the practice. Therefore where the trial was had in Trinity vacation, and the defendant surrendered in Michaelmas vacation, it was holden that he ought to be charged in execution in Hilary term. *Baxter v. Bailey*, 3 Mees. & W. 115. *Thorn v. Leslie*, 8 Ad. & El. 195. The fact also of the defendant's being in the mean time removed by *habeas* to the prison of another court, in a civil suit, made no difference in his respect. *Morris v. Magrath*, 3 Brod. & B. 301. And in a modern case, since the above rule, where the trial took place in Hilary vacation, and the defendant, in a few days afterwards and before the next term, rendered in discharge of his bail: the court of King's Bench held that the plaintiff should have charged him in execution during the next term; and that as he had not done so, the defendant was entitled to his discharge upon *supersedeas*. *Borer v. Baker*, 2 Dougl. 608.

But the plaintiff was not bound to charge the defendant in execution, pending a writ of error, see *Garrett v. Mantell*, 2 Wils. 380, even although the writ were such as might have been quashed, *Laroche v. Wasborough*, 2 T. R. 737, or even where bail, although put in, were not justified. *Maitland v. Mazaredo*, 6 M. & S. 139. And see *Sparrow v. Lewes*, 8 Taunt. 126. And where the writ of error operates as a *supersedeas*, (see *ante*, p. 138), he cannot charge the defendant in execution pending it. *Stonehouse v. Ramsden*, 1 B. & A. 676. *Marston v. Halls*, 2 Mees. & W. 60. See *Fisher v. M'Namara*, 1 B. & P. 292. So, where the plaintiff had become bankrupt, and the defendant prevented the assignees from proceeding to execution in time, by pleading to the *scire facias* by which they sought to make themselves parties to the record: the court refused a *supersedeas*. *Bibbins v. Mantel*, 2 Wils. 378. So, where the defendant, after rendering in discharge of his bail in an action in the Common Pleas, was committed to criminal custody for a misdemeanor, and so continued: that court refused a *supersedeas* for not charging him in execution in due time, as they had no jurisdiction to remove him by *habeas* from the criminal custody in which he then was. *Freeman v. Weston*, 1 Bing. 221. And see *Altroffe v. Lunn*, 9 B. & C. 395. *Jones v. Danvers*, 5 Mees. & W. 234. But a defendant in custody under an attachment for non-payment of costs, may be charged in execution. *Bonafous v. Schoole*, 4 T. R. 316. A defendant may also suspend his right to a *supersedeas*, by entering into a negotiation with the plaintiff, or by giving him a notice of his intention to apply for his discharge under the Insolvent Act; but these we shall consider presently under the Title "*Supersedeas*."

If the defendant be in the custody of the sheriff, the method of charging him in execution, is by lodging a *ca. sa.* with the

sheriff, as in ordinary cases, and getting a warrant thereupon directed to the gaoler or officer who has him in custody. If the venue be in the county where the defendant is in custody, a *ca. sa.* is lodged; if in another county, a *testatum ca. sa.* must be lodged, a *ca. sa.* being previously sued out to warrant it. This completes the execution; and it is not necessary afterwards to remove the defendant into the custody of the keeper of the Queen's prison; *Owen v. Owen*, 2 B. & Ad. 805; or if he be afterwards removed into such custody in any other suit, *Searl v. Johnson*, 1 Dowl. 384, or if he remove himself, *Deemer v. Brooker*, 1 Har. & W. 206, 3 Dowl. 576, and see 8 C. 4 Dowl. 9, it is not necessary for the plaintiff to do any thing further to charge the keeper of the Queen's prison with the defendant. Where the defendant is in custody in the country, it will be sufficient to deliver the *ca. sa.* to the sheriff's agent in town; and where it was so delivered within the two terms, although it did not actually reach the gaoler, in whose custody the defendant was, until after that time, the court held that the defendant was properly charged in execution. *Williams v. Waring*, 2 Cr. M. & R. 354. In a late case, where the defendant was in the county gaol, and a *ca. sa.* against him at the suit of the sheriff, directed to the coroner, was handed by the coroner to the gaoler, the court held this to be a sufficient charging of the defendant in execution. *Bastard v. Trutch*, 5 Nev. & M. 109. S. C. nom. *Bastard v. Gutch*, 1 Har. & W. 321. S. C. nom. *Barstow v. Trutch*, 4 Dowl. 6.

If the defendant were in custody of the marshal or warden, by stat. 2 W. 4, c. 39, s. 8, the proceedings were required to be as against "prisoners in the custody of the sheriff, unless otherwise ordered by some rule to be made by the judges." And no rule has since been made by the judges, upon the subject of the mode of charging a defendant in execution. But the mode of charging a defendant in custody of the sheriff, in execution, we have seen is, by suing out a *ca. sa.* and lodging it with the sheriff,—a mode of proceeding wholly inapplicable to defendants in the custody of the marshal or warden, or of the keeper of the Queen's prison. The mode of charging in execution a defendant who is in the custody of the keeper of the Queen's prison, in practice, therefore, remains the same as that of charging him in execution, whilst in the custody of the marshal, was before the statute, and is thus:

If the defendant be in custody of the keeper of the Queen's prison, at the suit of the plaintiff, charged with the action, *Get a side bar rule, requiring the keeper to acknowledge the defendant to be in his custody; take this to the keeper's office, and the acknowledgment will there be written upon it.* This acknowledgment must be of the same term in which the prisoner is charged in execution; an acknowledgment of a prior

term will not be sufficient. *Fisher v. Stanhope*, 1 T. R. 464. *unningham v. Cohen*, 10 East, 46. You then make out a committitur piece (see the form, in the Appendix) on a plain piece of parchment, and file it with the officer who acts as clerk of the judgments. And lastly enter the committitur in the keeper's book, which is kept at the office of the clerk of the judgments. This last entry, however, has been holden not to be essential to the validity of the charging of the defendant in execution. *Muspratt v. Dixon*, MS. East, 1819. By R. E. 1 G. 3, the committitur above mentioned must be filed with the clerk of the dockets, "on or before the last day of the term in which such prisoner is to be charged in execution; and the said clerk of the dockets shall enter such committitur on the judgment roll within four days next after the end of such term, exclusive of the last day of the term, and that in default hereof, such prisoner shall be entitled to be discharged. See *Urden v. Brockbridge*, 2 B. & C. 842. *Potterel v. Philby*, Burr. 1841. But it may be doubted if the latter part of this rule is now in force; for by R. H. 2 W. 4, s. 95, "in order to charge a defendant in execution, it shall not be necessary that the proceedings be entered of record."

But if the defendant be in custody in the Queen's prison, at the suit of a third party, and not of the plaintiff, and the plaintiff, having obtained judgment against him, wish to charge him in execution, his only way is to have him brought up by *habeas corpus ad satisfaciendum*, and have him charged in execution in open court. *Smith v. Sandys*, 1 Har. & W. 377, 5 Nev. M. 59. And where a prisoner, who had been plaintiff in an action, and was nonsuit, was in custody at the suit of a third party, the court held that he might be brought up by *habeas*, and charged in execution for the costs of the nonsuit; and that the writ might issue without any affidavit. *Furnival v. Tringer*, 3 Bing. N. C. 96. Although the judgment be against several, yet it is not necessary that this writ of *habeas* should be against more than those defendants who are in actual custody. *Wilson v. Bacon*, 1 Dowl. 118. And where a part of the debt had been levied under a *fi. fa.*, it was holden that the *habeas corpus*, which was in fact for the residue, was not irregular, by reason of its not referring to or reciting the *fi. fa.* and the levy made under it. *Green v. Foster*, 2 Dowl. 91. This writ is engrossed on parchment, (see the form, in the Appendix), and then signed and sealed; it should in strictness be delivered to the keeper of the Queen's prison, two days before the defendant is to be brought up. On the day in question, the defendant being in court in the custody of the petaff, will be charged in execution accordingly by one of the masters.

In the same manner, if the defendant be in custody of the

keeper of the Queen's prison, charged with an action in the court of Common Pleas or Exchequer, the mode of charging him in execution is, by having him brought up by *habeas* to the court in which the action is pending, and there charged in execution. In the court of Common Pleas, this is done without motion; *per Tindal, C. J. in Re Stanford*, 1 Dowl. N. C. 185; in the Exchequer, it is done upon motion in open court.

If the defendant be in any other custody on a criminal account, the courts of Exchequer and Common Pleas cannot, and if he be in custody for punishment, the court of Queen's Bench will not, grant a writ of *habeas corpus* to bring him up, in order to charge him in execution. Where a defendant was under military arrest at Woolwich, under circumstances which might or might not lead to a court martial, and an application was made to the court of Exchequer for a *habeas corpus*, to bring him up, in order to charge him in execution: that court refused it, saying that they had only civil jurisdiction, and no authority to change the custody in such a case as this. *Jones v. Danvers*, 5 Mees. & W. 234.

Or the plaintiff, instead of charging the defendant in execution, may sue out a *fi. fa.* against his goods; and this, without first discharging him out of custody. *Jones v. Tye*, 1 Dowl. 181. Or if he only levy a part, he may charge the defendant in execution for the residue. *See Green v. Foster*, 2 Dowl. 191. Also if the party die while in custody in execution, the other party may sue out execution against his lands or goods, in the same manner as if he had never been in execution. 21 J. 1, c. 24. Where the defendant died in custody in execution on the 31st July, having personal property in Surrey, and the venue being in Middlesex, it was necessary to sue out a *testatum fi. fa.*; to warrant the *testatum*, the plaintiff's attorney sued out a *fi. fa.*, tested on the first and returnable on the last day of Trinity term, which was returned *nulla bona* by himself and not by the sheriff, and he at the same time sued out the *testatum fi. fa.*, tested on the last day of Trinity term and returnable in Michaelmas term: the court held that there was no objection to the attorney's writing a return on the *fi. fa.*, which was merely a matter of form; that although the *fi. fa.* might be bad in itself, yet it was sufficient to warrant the issuing of the *testatum*; and that there was no objection to the *testatum* bearing teste in the life time of the defendant, it not being actually sued out until after his death. *Furncombe v. Kent*, 2 Dowl. 464.

What has been said here as to charging a defendant in execution, applies equally to a plaintiff who is in custody, and against whom a defendant obtains a judgment. And therefore it has been holden that a plaintiff, in custody of the

in another suit, might be brought up by *habeas corpus facendum*, in order to be charged in execution for the nonsuit. *Furnival v. Stringer*, 3 Bing. N. C. 96.

supersedeas.] It has been already mentioned, that where a defendant is in custody of the keeper of the Queen's prison or at the suit of a plaintiff, if the plaintiff do not declare against him before the end of the next term after the arrest or return, or after render or notice thereof (where the render is a declaration); or if he do not proceed to trial or final judgment within three terms inclusive after declaration, or after return and notice thereof (where the render is after declaration); or if he do not proceed to charge the defendant in execution within two terms inclusive after such trial or final judgment, or after render and notice thereof (where the render is after final judgment); the defendant is entitled to be discharged out of custody by writ of *supersedeas*. See *ante*, 222, 223.

a maxim in practice, that when once a prisoner is superse-
deas, he is always supersedeable; that is, that the plaintiff
prevent his being discharged by *supersedeas*, by taking
up, the want of which in proper time rendered the
prisoner supersedeable. For instance, if a defendant be
superseas for want of declaration, the plaintiff cannot
prevent him of his right to a *supersedeas*, by afterwards de-
claring; or if he be supersedeable for want of proceeding to
trial or final judgment, he cannot prevent his discharge by
proceeding to trial or final judgment; or if he be
superseas for want of being charged in execution, if the
plaintiff afterwards charge him in execution, the court upon
application will discharge him. *Hewitt v. Melton*, 1 Cr. & M. 579.
where he is thus supersedeable for want of being charged in
execution, he cannot afterwards be taken on *ca. sa.* on the
judgment; *Line v. Lowe*, 7 East, 330. *Brown v.*
Wright, 1 Dougl. 426; nor can he be holden to bail (*ante*,
p. 139), or detained in custody, in an action of
error on the judgment, *Pierson v. Goodwin*, 1 B. & P. 361,
where he may be taken on a *ca. sa.* in such action.
Ford v. Foot, Cowper, 72. *Ismay v. Dervin*, 2 W. Bl.
There is but one exception to the maxim above men-
tioned, namely, that if a prisoner supersedeable for any other
reason than that of not being charged in execution in time, be
afterwards charged in execution before he actually applies for
supersedeas, the court will not afterwards discharge him, if
it appears that he had an opportunity of applying to be super-
seas and did not avail himself of it. *Rose v. Christfield*,
11. 591. Even after application and before he is dis-
charged, if the plaintiff lodge a *habeas corpus* with the keeper
of the Queen's prison, to bring him up in the following term,

to be charged in execution, it will have the effect of detaining him. So, if the defendant be in custody in two actions at the suit of the same plaintiff or of different plaintiffs, his being supersedeable on one, does not affect the plaintiff's right to proceed against and detain him on the other. *Foy v. Percy*, 1 T. R. 592.

The defendant however may waive his right to a *supersedeas*; and if, instead of applying for it, he take a subsequent step in the cause, he will be deemed to waive his right to be superseded. Thus, under the old practice, where the declaration was delivered in due time, but the bill was not filed until after the time limited had expired, and the defendant pleaded: the court held that by pleading, the defendant had waived his right to a *supersedeas*, although at the time he was not aware of the default which entitled him to be superseded. *Pearson v. Rawlings*, 1 East, 77.

There are other causes, which have been already mentioned, (see ante, p. 225) which may prevent a defendant from obtaining a *supersedeas*. Besides these, it has been holden that if there be any agreement or treaty pending between the parties, the defendant shall not be superseded for want of the plaintiff's proceeding in the cause, pending such agreement or treaty. But it is now ordered, that no treaty or agreement shall be sufficient cause to prevent any defendant's having the benefit of a *supersedeas* for want of prosecution, unless the same be in writing, signed by the defendant or his attorney or some person duly authorised by the defendant, and it be therein expressed that proceedings are stayed at the defendant's request. *R. H. 26 G. 3, K. B.*; *R. H. 35 G. 3, C. P.* And therefore where there was a written agreement signed by the attorney, but it did not express that the proceedings were stayed at the defendant's request, it was holden to be a nullity, and the defendant was discharged. *Hewitt v. Melton*, 1 Cr. & M. 579.

Also, after a defendant in custody shall give the plaintiff notice of his intention to apply for his discharge under the insolvent act, he shall not be superseded or discharged on account of the plaintiff's not proceeding against him according to the rules and practice of the court, from the time of such notice until some rule or order shall be made in that behalf. *R. E. 3 G. 4, K. B.*; *R. M. 3 G. 4, C. P.* See *Holmes v. Murcott*, 1 Bing. 431. *Garlick v. Ballinger*, 10 Price, 124. *Molyneux v. Brown*, 2 Dowd. 84. And, by stat. 1 & 2 Vict. c. 110, s. 41, no prisoner, whose estate shall by an order under that act have been vested in the provisional assignee, shall, after the making of such order, be discharged out of custody as to any action, suit or process for or concerning any debt, sum of money, damages or claim, with respect to which an adjudication can under the provisions of this act be made, by or by virtue of any *supersedeas*, judgment of *nonpross*, or judgment.

in case of a nonsuit, for want of the plaintiff in such action, &c. proceeding therein. See *Buzzard v. Bouffield*, 4 *Moss. & W.* 368.

The application is usually to a judge at chambers, upon summons, unless he direct the application to be made to the court. In order to apply in either way, defendant's attorney should first obtain a copy of causes from the office of the prison, as the foundation of the application. The judge's order for the *supersedeas* "may be obtained at the return of one summons, served two days before it is returnable; such orders in town causes being absolute, and, in country causes, unless cause shall be shown within four days, or within such further time as the judge shall direct." *R. G. H. 2 W. 4*, s. 89. As soon as the order absolute is obtained, enter a common appearance for the defendant, as directed *ante*, vol. 1, p. 115, and get a certificate from the officer of your having done so. Then, if the defendant be in the custody of the keeper of the Queen's prison, upon your producing the order and certificate at the keeper's office, the defendant will be discharged from that action; but if he be in the custody of the sheriff, you must sue out a writ of *supersedeas* (see the form in the Appendix,) the order and certificate being the officer's authority for signing it; get it sealed; and then deliver it at the office of the sheriff, who will thereupon discharge the party.

The marshal and warden were ordered (by *R. G. H. 2 W. 4*, s. 86—88) to discharge all prisoners in their custody at the expiration of one month from the time they should become *supersedeable*; and if by reason of any writ of error, order of the court, agreement of the parties or other special matter, such a party be not really *supersedeable*, the plaintiff must give notice thereof in writing "with all convenient speed" to the marshal or warden, on pain of losing the right to detain the prisoner. See *Siggers v. Brett*, 5 *B. & Ad.* 455. *Lewis v. Gompertz*, 6 *Dowl.* 124. The same rule now applies to the keeper of the Queen's prison.

SECTION II.

Habeas corpus.

The writ of *habeas corpus ad faciendum et recipiendum*, is of three kinds: the writ *ad faciendum et recipiendum* merely, and which is usually called the *habeas corpus cum causa*; the *habeas corpus ad respondendum et ad faciendum et recipiendum*; and the *habeas corpus ad satisfaciendum, et ad faciendum et recipiendum*. These we shall now consider in their order.

[*Habeas corpus cum causa.*] If a defendant be in custody of the sheriff, under process from any of the courts of common

law at Westminster, he has a right to have himself removed to the Queen's prison by this writ.

- Formerly if a defendant were in custody under process of an inferior court, in the prison of such court, he might have himself removed to the Queen's Bench prison or the Fleet, and the cause at the same time removed into the court of Queen's Bench, Common Pleas, or Exchequer, respectively, by this writ. Or if he were not in actual custody under process of the inferior court, but had been bailed, or if the process, although in form against the person, had been only served upon him, he might have the cause removed into the court of Queen's Bench, &c. by this writ. But as in these cases, the writ of *habeas* must have been delivered to the steward or judge of the inferior court, before issue or demurrer joined, 21 J. 1, c. 23, s. 2, or, where the defendant had allowed judgment to go by default, before a writ of enquiry should be executed, *Godley v. Marsden*, 6 Bing. 433. *Smith v. Sterling*, 3 Dougl. 609, and as inferior courts have no authority now to issue process against the person of a defendant before judgment, of course the writ of *habeas corpus cum causa* is not now applicable in such cases.

If a defendant be in custody, and you wish to have him brought up, for the purpose of rendering him in discharge of his bail, you may have him brought up by this writ.

In order to sue out the writ, get a blank form at the stationer's and fill it up. See the form, in the Appendix. The direction may be thus:—"To the keeper of our prison;" or "To the sheriff of the county of ———:" or when to the sheriffs' court of London, "To the sheriffs of London;" or when to the mayor's court of London, "To the mayor, aldermen and sheriffs of London;" and the like in other cases. Get it signed and sealed. Then take it to the office of the officer, &c. to whom it is directed, and he will execute it.

Habeas corpus ad respondendum.] This writ is for bringing a prisoner into court, for the purpose of declaring against him. Formerly it was necessary, where a defendant was in custody of the warden on process of the court of King's Bench, and the plaintiff wished to declare against him in that court; or where a defendant was in custody of the marshal on process of the court of Common Pleas or Exchequer, and the plaintiff wished to declare against him in either of these courts respectively: in these cases the defendant was by virtue of this writ brought into the court out of which the writ issued, and charged there with a declaration, and he was then committed in custody to the prison of the court in which he was so charged. But this is no longer necessary; since the one prison has become common to all these courts, and since by stat. 2 & 3 W. 4, c. 39, s. 8, proceedings against prisoners in

custody of the marshal or warden shall be as against prisoners in the custody of the sheriff, and against prisoners in custody of the sheriff you may declare without bringing them up by *habeas*, you may now declare in the Queen's Bench against a prisoner in custody under process of that court, or of the Common Pleas or Exchequer respectively, without bringing him up by *habeas*. *Barnett v. Harris*, 2 Dowl. 187. *Millard v. Millman*, *Id.* 523. And as this may be done, it is probable the court would not now grant the writ of *habeas corpus ad respondendum*. But see *Guiseppe v. Haynes*, 10 Law J. 425 *ex.*

Habeas corpus ad satisfaciendum.] This writ is to bring a prisoner up to court, for the purpose of charging him in execution. It is required in all cases, where the defendant is in the custody of the keeper of the Queen's prison, but not in custody in the action. See *ante*, p. 227. Also if a plaintiff, who is nonsuit, or has a verdict against him, be a prisoner, he may be brought up by this writ, for the purpose of being charged in execution for the costs. *Furnival v. Stringer*, 3 Bing. N. C. 96.

SECTION III.

Proceedings in other matters.

Attachment against.] Formerly, in the Exchequer, a party in custody of the marshal could not be brought up, for the purpose of being charged with an attachment for nonpayment of costs. *Boucher v. Sims*, 2 Cr. M. & R. 392. And see *Briant v. Clutton*, 5 Dowl. 66. But in the court of Queen's Bench it was and is the usual practice; whether legal or not, has never been decided. And as the Queen's prison is now the prison of all the courts at Westminster, it should seem that the courts of Common Pleas and Exchequer would adopt the practice of the court of Queen's Bench in this respect. But the courts will not grant a writ of *habeas* to bring up a prisoner already charged with an attachment, to enable him to move in person to set it aside. *Ford v. Nassau*, 1 Dowl. N. C. 631, 11 Law J. 287, *ex.*

Irregularity.] If a prisoner have to complain of an irregularity in the proceedings against him, he must now do it within the same time as persons not in custody; *Primrose v. Baddeley*, 2 Cr. & M. 468. *Claridge v. McKenzie*, 12 Law J. 131, *c. p.* And see *Foot v. Dick*, 1 Har. & W. 207. *Fowell v. Petre*, 5 Dowl. 276; although formerly the practice was deemed to be otherwise. see *Rock v. Johnson*, 4 Dowl. 405. And it will be no excuse for delay, that he was not aware of

the irregularity, until shortly before the application. *Edaile et al. v. Davis*, 6 Dowl. 465. *Greenshield v. Pritchard*, 1 Dowl. N. C. 51, 10 *Law J.* 295 *ex.* So an application to set aside a regular judgment, on an affidavit of merits, must be made by a prisoner, within the same time, as if he were not in custody. *Fife v. Bruere*, 4 Dowl. 329. But where a writ of *ca. sa.* on which the defendant was imprisoned, was a nullity, (being sued out more than a year after the judgment, without a *scire facias*;) the court discharged the defendant, although thirteen years had elapsed from the time of the arrest. *Mortimer v. Piggott*, 2 Dowl. 615. So where the mode of charging the defendant in execution, was holden to be a nullity, the court discharged him as to the action, although fourteen years had elapsed. *Smith v. Sandys*, 1 Har. & W. 377.

Discharged, otherwise than by supersedeas.] If the debt and costs be paid, no matter by whom, the plaintiff has no right afterwards to detain the defendant in custody; and the court upon application will discharge him. *Rimmer v. Turner*, 8 Dowl. 601. Or if the plaintiff give a written discharge to the keeper or sheriff in whose custody the debtor may be, he should discharge him. But an order by the plaintiff's attorney it seems is not sufficient, unless the debt have been actually paid, or unless the plaintiff have authorized the attorney to give the discharge. See *Savory v. Chapman*, 11 Ad. & El. 829. Where the plaintiff died, after charging the defendant in execution, and the next of kin would not administer, the court upon application discharged the defendant. *Parkinson v. Horlock*, 2 New Rep. 240. *Broughton v. Martin*, 1 B. & P. 176. *Gore v. Wright*, 1 Dowl. N. C. 864. But where the plaintiff had appointed executors, *Dunsford v. Gouldsmith*, 8 Moore, 145, or administration was taken out, *Fothergill v. Walton*, 4 Bing. 711, the court refused to discharge the defendant, without the authority of the executor or administrator. Where however administration to the plaintiff had been taken out by the defendant's wife, the court discharged the defendant. *Pyne v. Erle*, 8 T. R. 407.

BOOK V.

ARBITRATION.

atters in dispute between parties may be referred by arbitration. The court of Queen's Bench, however, refused to make a submission a rule of court, where the matter agreed to be referred had been made the object of an indictment. *Watson v. M'Cullum*, 8 T. R. 520, *Baker v. Townsend*, 7 Taunt. 422, *R. v. Cotesbatch*, 2 B. & C. 265. And the court of Exchequer have holden that a submission was not the subject of a reference, and that an award as to its validity, and the extent of liability of one of the parties to it, was therefore bad, and could not be enforced. *Cole et al.*, 2 Cr. M. & R. 367, 1 Mees. & W. 531. Upon a trial before the sheriff, upon a writ of trial, a submission cannot be taken subject to an award; for the sheriff is bound to try the cause, and cannot delegate his authority to an arbitrator. *Wilson v. Thorpe*, 6 Mees. & W. 721. We shall consider this subject under the following heads: 1, submission; 2, the proceedings before the arbitrator; 3, an award; 4, the mode of enforcing the award; 5, the effect of an award; 6, the mode of setting aside an award.

1. The submission.

A submission to arbitration may be, by order of the court, or by judge's order, or by bond or other agreement of submission. These we shall consider separately. In drawing them up, care must be taken to define what matter in difference is intended to be referred. A reference is usually either of all matters in difference between the parties, or of the matters in difference in some particular cause, or of some specific matter in difference between them. A submission of all matters in difference between the parties in the cause, would be in fact a submission, not of the cause only, but of all matters in difference; the words "all matters in the cause," being merely a designation of the matters in difference and not of the subject of reference. *Malcolm v. Fullerton*, 2 T. R. 645. But a reference of all matters in difference between the parties, would be a reference of the cause only. *Id.* and see *Smith v. Muller*, 3 T. R. 624.

Where the submission recited a claim by the plaintiff against the defendant for a sum of 201*l.*, and then stated an agreement to refer all matters in difference; in fact the plaintiff had another claim against the defendant for 120*l.*, which he did not actually demand of him until after the date of the submission, but which he insisted upon before the arbitrator, and the arbitrator awarded upon it in his favour: the court held that this recital in the submission did not limit the effect of the larger operative words, and that the arbitrator was right in deciding upon this claim of 120*l.*, it being a matter in difference between the parties. *Charleton et al. v. Spencer*, 12 *Law J.* 23, *qb.* If by mistake the submission be drawn up differently from what was intended by one of the parties, so as to preclude him from bringing his case or any material part of it under the consideration of the arbitrator, he should apply to the other party to consent to its being amended; and if they refuse, a judge upon summons will probably allow him to revoke his submission. But the court, without consent, will not amend it. *Rawtree v. King*, 5 *Moore*, 167. *Pearman v. Carter*, 2 *Chit.* 29.

By whom.] Where the submission is by bonds or deed, the bonds or deed must be executed by the parties themselves, or by some persons authorized by them, for that purpose, by some instrument under seal; and the like, if the submission be by parol, or by agreement not under seal, except that the authority need not be by deed. And it has been held that one of several partners cannot bind his co-partners by a submission to arbitration, even of matters arising out of the business of the firm. *Stead v. Salt*, 3 *Bing.* 101. *Adams v. Bankart*, 1 *Cr. M. & R.* 681. and see *Boyd v. Emmerson*, 4 *Nev. & M.* 99. Where the submission is by rule of court or judge's order, it is always obtained by the attorneys of the respective parties; and at nisi prius, if the counsel or attorneys for parties in a cause consent to a reference, it is deemed binding on the clients, whether they are privy or consenting to it or not. *Filmer v. Delber*, 3 *Taunt.* 486. See *Biddell v. Downe*, 6 *B. & C.* 255.

By order of nisi prius.] When a cause is called on at nisi prius, it may be referred by an order of nisi prius. As soon as this is agreed upon, the counsel engaged in the cause indorse their briefs accordingly, and hand them to the associate, who will thereupon draw up the order. At the same time, it is usual to have the jury sworn, and to take their verdict for the plaintiff for the amount of the damages laid in the declaration, subject to the award; this is essentially necessary in bailable actions, for otherwise the bail would be discharged by the reference. 2 *Saund.* 72 *a.* If the award be at all likely to be

under 20l., or likely to be such in other respects, as would require the certificate of the judge, if the cause had been tried, to give the parties costs, care should be taken that a power be given to the arbitrator, by the order, to certify in the same manner the judge might have done. See *Wallen v. Smith*, 5 Mees. & W. 159. *Deever v. Swabey*, 10 Law J. 328, qb. *Spain v. Cadell*, 9 Dowl. 745.

By rule of court or judge's order.] It is only in cases where an action is pending, that the parties can submit to arbitration by a rule of court or a judge's order. The rule is obtained upon two motion papers, on which the terms of the reference are indorsed shortly thus: "*Referred to Mr. ——— on the usual terms; award to be made on or before the ———,*" adding if necessary such other terms, not included in the usual printed form of the rule, as may be agreed upon. *Get these signed by counsel, and take them to the master's office, and the clerk there will thereupon draw up the rule.* A judge's order is obtained from his clerk, upon a written consent to the like effect, signed by the attorneys on both sides. It may be necessary to mention, that a judge's order, referring a cause, may be made a rule of court, even after the submission has been revoked by one of the parties; for it may be necessary, notwithstanding the revocation, to act upon that part of the order which gives costs for wilful delay. *Aston v. George*, 2 B. & A. 395.

By bond, &c.] If no action be pending, or indeed whether there be or not, the parties may submit the matter in difference between them to arbitration, either by mutual bonds of submission, or by deed, or by agreement not under seal, or by parol. I have given a form of such a bond, in the Appendix, from which a deed or agreement, if preferred, may readily be framed. In these instruments, care should always be taken to introduce the usual consent clause, under stat. 9 & 10 W. 3, c. 15, which shall be mentioned presently, that the submission may be made a rule of court; otherwise you will not be enabled to proceed against the party by attachment, or execution, for non-performance of the award.

By stat. 9 & 10 W. 3, c. 15, s. 1. Parties wishing to end "any controversy, suit or quarrel, for which there is no other remedy but by personal action or suit in equity," by arbitration, may agree that their submission shall be made a rule of any of His Majesty's courts of record, and insert such agreement in their submission; and the same may afterwards, upon affidavit thereof by one of the witnesses thereto, be entered of record in such court, and a rule be made thereupon; and if any of the parties disobey the award or umpirage to be made in pursuance of such submission, he shall be deemed guilty of

a contempt of the said court, and the court on motion shall issue process against him.

A parol submission is not within this Act, and cannot therefore be made a rule of court, even with the consent of parties. *Ansell v. Evans*, 7 T. R. 1. Nor are mere criminal matters, which are the subject of indictment, within the Act; the words "Controversies, suits or quarrels," meaning only civil disputes between the parties. *Per* *Ld. Kenyon in Watson v. McCullum*, 8 T. R. 520, and *see Lucas v. Wilson*, 2 Burr. 701. Where three actions in the Exchequer and one in the King's Bench, were referred by one agreement, containing a consent that it might be made a rule of the court of King's Bench or Exchequer; and after the award was made, the submission was accordingly made a rule of the court of King's Bench; and there was an application also to make it a rule of the Exchequer, but that court refused to do so, saying that the court of King's Bench, of which the submission was already made a rule, could deal with the whole matter, as well as they could. *Wimpenny v. Bates*, 1 Dowl. 559. So, where a cause in the Exchequer was referred by a judge's order, and it was made a part of the order that it should be made a rule of the court of Queen's Bench: upon application for this purpose to Pattison, J. in the bail court, he held there was no objection to it, and it was accordingly done. *Milstead v. Crayfield*, 9 Dowl. 124. Where the consent was, to make the "award" a rule of court, instead of the submission, the court held it to be sufficient. *Pedley v. Westmacot*, 3 East, 603. *Re Story et al.* 7 Ad. & El. 602. *See Soilleux v. Herbst*, 2 B. & P. 444. *Re Woodcroft & Jones*, 9 Dowl. 538. Where the agreement of submission contained this consent, and the time for making the award was afterwards enlarged, but the enlargement did not contain it, it was contended that the submission alone could be made a rule of court, but not the enlargement: but the court, after consulting with the other judges, held that a general consent to enlarge, virtually included all the terms of the first submission, and among the rest the consent to make it a rule of court. *Evans v. Thompson*, 5 East, 189. The submission may be made a rule of court in vacation, as well as in term. *Re Taylor*, 5 B. & A. 217. And it may be made a rule of court, even after it has been revoked. *Aston v. George*, 2 B. & A. 395. *See 5 Taunt. 452, sem. cont.*

Arbitrator refusing to act, &c.] Where a verdict for plaintiff was taken at nisi prius, subject to the award of a barrister, who afterwards declined to act, as he had previously been consulted by one of the parties; the defendant was therefore required to join in appointing another arbitrator, but he refused to do so, saying that he wished the case to be submitted to a jury: but

the court, upon application, ordered that unless he would consent, within a time limited, to refer the damages to another arbitrator, judgment should be entered up, and execution issue, for the damages given by the verdict. *Woolley v. Kelly*, 1 B. & C. 68. See *Kirkus v. Hodgson*, 8 Taunt. 733. But where in such a case, the arbitrator died, and the parties agreed to substitute another, but the defendant afterwards would not join in the appointment; the court refused to interfere, saying that the death of the arbitrator had the effect of opening the cause, and they could not therefore order execution to issue on the verdict. *Harper v. Abrahams*, 4 Moore, 3. Nor can the parties, in such a case, where the cause has been referred at nisi prius and a verdict taken, regularly go to trial a second time, without the leave of the court, or until the verdict has been set aside. *Evans v. Davis*, 1 Gale, 150. Where there was a reference by deed to A. and B. and afterwards by a written memorandum C. was substituted for B.: this was holden to be a good substitution, as amounting to a submission not under seal, incorporating in it all the provisions of the former submission, except perhaps that of making it a rule of court. *Re Turno & Bird*, 2 Nev. & M. 328.

Revocation.] Formerly a party to an arbitration, might revoke his submission, at any time before the arbitrator had made his award; *Milne v. Gratrix*, 7 East, 608; and if the arbitrator, disregarding the revocation, afterwards proceeded and made his award, the court would set it aside, *Clapham v. Higham*, 1 Bing. 87, at least, in cases where the award might be enforced without application to the court, as, for instance, where the award ordered a verdict to be entered up, *Doe v. Brown*, 8 D. & R. 100, or the like. But where the submission was by deed, and was revoked by one of the parties by deed, and the arbitrator still proceeded in the reference and made his award: the court of Common Pleas held that he was right in doing so; because the other party was entitled to his action for damages for breach of the covenant to abide by the award. *King v. Joseph*, 5 Taunt. 452; and see *Steward v. Williamson*, 5 Bing. 415. And in such a case, if the submission were by bond, or even by agreement with a penalty, the bond or penalty would be forfeited by the revocation, and might be immediately put in force. *Warburton v. Storr*, 4 B. & C. 103.

But now, by stat. 3 & 4 W. 4, c. 42, s. 39, where the submission is by rule of court, judge's order or order of nisi prius, or where the submission contains an agreement that it shall be made a rule of court, it shall not be revocable by any party to the reference, "without the leave of the court, by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may and is hereby required to proceed with

the reference, notwithstanding any such revocation, and make such award, although the person making such revocation shall not afterwards attend the reference; and the court or any judge thereof may from time to time enlarge the term for any such arbitrator making his award." See *Bright v. Durnell*, 4 Dowl. 756. *R. v. Bardell*, 1 Nev. & P. 74. If the application be made to the court, they will grant a rule nisi only; or if made to a judge at chambers, it must be upon summons, for he cannot make an order on an ex parte application. *Clarke v. Stocken*, 2 Bing. N. C. 651, 5 Dowl. 32, 2 Hodg. 1. Where an application was made for leave to revoke a submission, on the ground that there being a power given to the arbitrator to state points of law upon the face of his award for the opinion of the court, several objections were stated to him which he considered weighty, and he consented to receive evidence upon them, but he refused to decide them, saying that he would raise upon his award such objections as he should think important, but would not pledge himself to raise any objection in particular: the court held this not to be a sufficient ground for the application, although the objections appeared to be well founded. *Scott v. Van Sandau*, 1 Ad. & El. N. C. 102. The court or judge, however, cannot give leave to revoke a submission, where the award is already made; all they can do is to set aside the award. *Phipps v. Ingram*, 3 Dowl. 669.

The death of any of the parties to a reference, is an implied revocation of a submission, if there be no proviso therein to prevent it; and the court will set aside any award subsequently made, *Potts v. Ward*, 1 Marsh, 366, even although it be in favour of the deceased, *Toussaint v. Hartop*, 7 Taunt. 571; and see *Maffey v. Godwin*, 1 Nev. & M. 101, and although a verdict was taken subject to it. *Cooper v. Johnson*, 2 B. & A. 394. *Rhodes v. Haigh*, 3 D. & R. 608, 2 B. & C. 345. And see *Bower v. Taylor*, therein cited. But this is now usually prevented by some proviso in the submission, either directly stipulating that the death of either party shall not be a revocation, *M'Dougal v. Robertson*, 4 Bing. 435. *Prior v. Hembrow et al.* 8 Mees. & W. 873, or impliedly, by authorizing the arbitrator to deliver the award to the parties, or if either of them should be dead, to their respective personal representatives, *Clark v. Crofts*, 4 Bing. 143. *Tyler v. Jones*, 3 B. & C. 144. *Wrightson v. Bywater et al.*, 3 Mees. & W. 199, or the like. Upon an application in such a case to set aside the award, on the ground that one of the parties having died pending the reference, the opposite party (the present applicant) insisted that his personal representatives should be made parties; but the arbitrator refused to stay the reference on that account, and made an award in favour of the deceased: the court held that this was no ground for setting aside the award. *Re Hare et al.*, 8 Dowl. 71.

The bankruptcy of one of the parties, however, is no revo-

on of the submission ; but the arbitrator notwithstanding proceed in the reference, and make his award. *Andrews v. Palmer*, 4 B. & A. 250. *Snook v. Hellyer*, 2 Chit. 43. *Taylor v. Darling et al.*, 2 Man. & Gr. 55. *Taylor v. Shuttleworth*, 8 M. 281. So the insolvency of a party, it seems, is not a cation. See *Hobbs v. Ferrara*, 8 Dowd. 779.

Proceedings before the arbitrator, and the award.

fter having obtained the submission, and ascertained that arbitrator will undertake the reference, get a written ap-
tment from the arbitrator, and serve a copy of it on the op-
le party. Make out a short statement of your case, and leave
ith the arbitrator ; or if the cause have been referred at nisi
e, leave him one of the briefs. Then attend at the time ap-
ted, with your witnesses, and have them called in before the
trator, in the order in which you wish them to be examined.
tatements, as above mentioned, or the briefs, have been deli-
d to the arbitrator, it is not usual or necessary for even
uel to address him in the first instance, but he at once pro-
e to hear the witnesses on both sides ; and he then hears the
es by their counsel or attorneys,—for the plaintiff first, then
he defendant, and lastly (if the defendant have called wit-
es or given other evidence), for the plaintiff in reply. Some
trators, in cases where the defendant has given evidence,
w the counsel or attorney for the defendant to address him
, and then the plaintiff's counsel or attorney in reply. But
is, and in all other matters under the immediate control
e arbitrator, it is impossible to lay down any general rule
actice, each arbitrator usually adopting such a line of
tice in this respect as he thinks best. As to the law
ected with this part of the subject, independently of the
tice, it will be convenient to consider it under the fol-
ing heads.

mpire and umpirage.] If the submission direct an umpi-
, in case the arbitrators should disagree, it either names
umpire, or directs how and when he should be appointed.
is to be appointed by the arbitrators, he may in general
ppointed by them before they enter upon the reference,
although the submission give the power to appoint only
se of their disagreeing. *Bates v. Cook*, 9 B. & C. 407.
d. *Wood v. Doe*, 2 T. R. 644. They may, in fact, appoint
either before or after the time limited for making their
rd, provided they do so before the time limited for making
umpirage. *Harding v. Watts*, 15 East, 556. And they must
int him, if at all, before the time appointed by the sub-
sion for the making of his umpirage. *Re Doddington et al.*

8 *Law J.* 331, *cp.* If the arbitrators are to appoint him, his appointment should be matter of choice, not of chance: they cannot choose him by lot, or by tossing up, or the like; if they do, his umpirage cannot be enforced, and the court upon application will set it aside; *Re Cassel*, 9 B. & C. 624. *Ford v. Jones*, 3 B. & Ad. 248. *Wells v. Cooke*, 2 B. & A. 218. *Young v. Miller*, 3 B. & C. 407. *Re Greenwood et al.* 9 Ad. & El. 699. *Hodson v. Drewry*, 7 Dowl. 569; unless indeed he have been so chosen, with the knowledge and consent of the parties. *Re Tunno & Bird*, 5 B. & Ad. 488, 2 *Ner. & M.* 328, and see *Re Jamieson*, 2 R. & W. 35. Where one of two arbitrators chose the umpire, under some claim of right to do so, which was acquiesced in, though with some reluctance, and for the sake of peace, by the other: the court refused to set aside the umpirage. *Re Vinicombe & Morgan*, 10 *Law J.* 128, *qb.* Where arbitrators choose an umpire, and, upon his refusing to act, choose another, their second choice is good; their power to appoint is not determined by the first choice, if the umpire then chosen refuse to act. *Trippet v. Eyre*, 3 *Lev.* 563. *Oliver v. Collings*, 11 *East*, 367.

When the umpire enters upon his umpirage, he may re-examine the witnesses; but it has been holden not to be objectionable, for the umpire to receive the evidence from the arbitrators, unless the parties require him to do otherwise, *Hall v. Lawrence*, 4 *T. R.* 589, or expressly consent to his doing otherwise; if either of them request of him to examine the witnesses, and he refuse to do so, the court will set aside the award. *Re Salkeld et al.* 10 *Law J.* 22, *qb.* So, if an umpire refuse to receive further evidence, besides that which was given before the arbitrators, his umpirage will be bad, and the court will set it aside; and the fact of one of the parties having taken it up, will be no waiver of the objection. *Re Jenkins et al.* 11 *Law J.* 71, *qb.* He may make his umpirage at any time before the expiration of the time limited for that purpose by the submission; he may do so even before the time limited for the arbitrators making their award. *Spriggs v. Nash*, 5 *M. & S.* 193. *Smailes v. Wright*, 3 *M. & S.* 559. Where the umpire was to make his umpirage within six months, and he made it within six calendar months, but not within six lunar months, the umpirage was holden bad. *Re Swinford and Horn*, 6 *M. & S.* 226. There is no objection to the arbitrators joining with him in his umpirage; their doing so does not affect the umpirage either one way or the other. *Soulsby v. Hodgson*, 3 *Burr.* 1474. *Beck v. Sargent*, 4 *Tenn.* 232. But it seems that arbitrators cannot decide upon part, and the umpire upon another part, of the matters referred, unless the submission contain a special authority to that effect. *Tollit v. Saunders*, 9 *Price*, 612. On the other hand, where by the submission the arbitrators had a power to appoint

an umpire, and the parties bound themselves to perform and obey the award of the said two arbitrators and their umpire; an award was made by the two arbitrators only, and it did not appear they had appointed any umpire: the court held the award bad, and refused to grant an attachment for the non-performance of it. *Hetherington v. Robinson*, 4 Mees. & W. 608.

Witnesses.] Where the submission is by rule of court, or judge's order, or order of nisi prius, or where it contains a consent that it shall be made a rule of court, the attendance of witnesses before the arbitrator may be compelled, either by rule of court or a judge's order, the party, at the time of making the application, stating the county in which the witness resides, or that he cannot be found; they may also be compelled by such rule or order to produce such documents, as they would be bound to produce upon a trial. 3 & 4 W. 4, c. 42, s. 40. An appointment of the time and place of attendance, signed by one at least of the arbitrators or by the umpire, must be served upon the witness, together with or after the rule or order, and his expenses tendered to him in the same manner as in the case of a trial; after which, disobedience of the rule or order will be deemed a contempt of the court. *Id.* But he shall not be compelled to attend more than two consecutive days, to be named in such order. *Id.* There is no objection, it should seem, to have one order for all the witnesses on each side, and to serve copies upon them personally, at the same time showing them the original, in the same manner as in the case of a subpoena; but it may be prudent to have a signed appointment for each witness.

The witnesses may be sworn by any one of the arbitrators or the umpire. 3 & 4 W. 4, c. 42, s. 41. And the submission directing the witnesses to be examined on oath before a judge or commissioner (which may still be done, *James v. Atwood*, 5 Bing. N. C. 628), does not exclude this general power of the arbitrator to administer the oath. *Hodson v. Wise*, 4 Mees. & W. 536. *S. C. nom. Hodson v. Wilde*, 7 Dowl. 15. The form of oath to be administered, may be thus: "You shall true answers make to all such questions as shall be asked of you, touching the matters in question between the parties to this reference; So help you God." Or in the case of a Quaker or Moravian, he may make an affirmation thus, repeating it after the arbitrator: "I, A. B. being [one of the people called Quakers] or [one of the united brethren called Moravians] do solemnly, sincerely and truly declare and affirm, that I shall true answers make to all such questions as shall be asked of me, touching the matters in question between the parties to this reference." It is no objection, however, to an award, that the witnesses were not examined upon oath, if that objection were not made at the time of the examination. *Ridoat v. Pye*, 1 B.

& P. 91. But where the submission required the witnesses to be examined on oath, and the arbitrator received some affidavits, the court set aside the award, saying that the deponents ought to have been examined *viva voce*. *Banks v. Banks*, 1 Gale, 46.

Examination of parties.] The rule or order of reference usually authorizes the arbitrator to examine the parties, if he think fit. As it is a matter entirely in the discretion of the arbitrator whether he will examine a party or not, the court will not interfere where he refuses to do so. *Scales v. East London Waterworks Co.* 1 Hodg. 91. Indeed arbitrators very seldom avail themselves of the power; and when they do, it is usually by examining one party for the other, as to matters of which there is no other evidence. See *Warne v. Bryant*, 3 B. & C. 590. But there is no objection to his examining the parties, each in support of his own case, if he think fit. *Wells v. Benskin*, 9 Mees. & W. 45. The examination in such a case is usually conducted by the arbitrator himself, without the interference of counsel, &c.

Time for making the award, enlarged.] If the submission, as is usual, mention a time within which the award shall be made, that is a condition which must be strictly complied with. If that time is allowed to elapse, before the award is made, the court cannot interfere, either at the instance of the arbitrator or of one of the parties, *Burley v. Stevens*. 4 Dowl. 255, without the consent of the rest. *Teasdale v. Atkins*, 2 Tidd. 880. An award made after the time would be bad; *Good v. Wells*, 2 Tidd. 881; or if the arbitrator enlarge the time, without authority for that purpose, and make his award within the enlarged time, it will be bad. See *M'Arthur v. Campbell*, 2 Nov. & M. 446 (a). If indeed a verdict has been taken subject to the award, that places the case within the power of the court; and where the time was accidentally allowed to elapse by the arbitrator, and the defendant refused to consent to its enlargement, the court ordered that unless he would consent, judgment should be given and execution issued for the amount of the verdict. *Taylor v. Gregory*, 2 B. & Ad. 774. *Wilkinson v. Time*, 4 Dowl. 37. But the court have refused to make such an order, where the award was not made within the time limited, owing to the negligence of the plaintiff's attorney. *Doe v. Saunders*, 3 B. & Ad. 783.

Where the submission is by rule or order, it usually contains a power to the arbitrator to enlarge the time for making his award; and which power he may exercise as often as he finds it necessary, for the purpose of making his award. *Payne v. Deakle*, 1 Taunt. 509. *Barratt v. Parry*, 4 Taunt. 658. And if power be thus given to the arbitrators to enlarge the time,

and in case of their disagreement they are to choose an umpire, who shall have power to make the award "at the time and in manner aforesaid," this impliedly gives the umpire power to enlarge the time by his single authority. *Re Vinicombe & Morgan*, 10 *Law J.* 128, *qb.* It is usually required to be done in some particular way specified in the submission; and the power must be strictly pursued. Where the order of reference required the arbitrator to make his award on or before a certain day, or before such further day as he should appoint by an indorsement on the order and the court or a judge should order; and the arbitrator enlarged the time by indorsement, and made his award within the enlarged time, but no judge's order was obtained: the court held the award to be bad, for at the time it was made the arbitrator had no authority. *Mason v. Wallis* 10 *B. & C.* 107. And the same, where the time was to be enlarged by indorsement, and it was, in fact, enlarged by a judge's order. *Leggett v. Finlay*, 6 *Bing.* 255. So, where a cause was referred to two arbitrators, with power to them to appoint a third, and the award was to be made by a day named, or such other day as "they or any two of them" should direct; they in fact enlarged the time before they appointed: the court held this to be clearly a bad enlargement, and that an award afterwards made by the three, was bad. *Reade v. Dutton*, 2 *Mees. & W.* 69. And the objection is not waived in such a case, by the party's attending before the arbitrator, cross-examining a witness, *Hall et al. v. Rouse*, 4 *Mees. & W.* 24, or the like. But see *Hallett v. Hallett*, 5 *Mees. & W.* 25, *seemb. cont.* But where the power given by an order of reference was, that the arbitrator might enlarge the time as he might require, and a judge of the court might think reasonable and just; and the arbitrator, before the original time expired, indorsed on the order that he required a further time, but the judge's order was not obtained till a day subsequent: this was holden to be sufficient. *Reid v. Fryatt*, 1 *M. & S.* 1. Where a submission enabled the arbitrator to enlarge the time, but did not mention in what manner it was to be done, it was holden to be sufficiently enlarged, by the arbitrator appointing a subsequent day for another meeting, in the presence of the parties. *Burley v. Stevens*, 4 *Dowl.* 770. Where a matter was referred to A. and B. who were to make their award on or before the 20th August, or such other time as they should appoint, and in case they disagreed it was referred to C. as umpire, so as his umpirage should be made before the 20th September or such other day as he should appoint; A. and B. did not make their award before the 20th August, but enlarged the time until the 1st November; and in the mean time C. enlarged his time until the 20th December; on the 20th October A. and B. gave notice to C. that they could not agree, and he afterwards made his umpirage on the 19th December: the court held the time to have been well enlarged by the um-

pire, although at the time he did so, he did not know that he should be called upon to act. *Re Doddington et al.*, 5 Bing. N. C. 591. And an irregularity in this respect, may in general be cured by the consent of parties. *See Benwell v. Hissman*, 1 Cr. M. & R. 934. *Lawrence v. Hodgson*, 1 Young & J. 16. *See Davison v. Gauntlett*, 3 Man. & Gr. 550. Where he enlarges it "until" a particular day, it is deemed inclusive of that day. *Kerr v. Jeston*, 1 Dougl. N. C. 538, and see *Higman v. Jessop*, 9 Dougl. 203. In bonds, &c. of submission, such powers to enlarge the time are not so usual; but if omitted, the day mentioned may be altered and the bond re-executed. *See Watkins v. Philpotts*, 1 Mc. Cl. & Y. 393, or the enlargement of the time may be effected by indorsement. *Graig v. Talbot*, 2 B. & C. 179. *Evans v. Thompson*, 5 East, 189. And it is now holden by the court of Exchequer, that the proviso in stat. 3 & 4 W. 4, c. 42, s. 39, (*ante*, p. 239) "that the court or any judge thereof may from time to time enlarge the term for any such arbitrator making his award," is not confined to the case of revocation mentioned in that section, but is of general application. *Burley v. Stevens*, 1 Mees. & W. 156; and see *Potter v. Newman*, 2 Cr. M. & R. 742. And therefore where a time is limited in the submission for the making of the award, and power is given to the arbitrator to enlarge it, but he through inadvertence allows the time to pass without doing so, the court upon application will enlarge it, *Parberry v. Newnham*, 7 Mees. & W. 378, if a very long and unreasonable time have not been allowed to elapse. *See Lambert et al. v. Hutchinson*, 2 Man. & Gr. 858. But when the time was allowed intentionally to expire, and one of the parties afterwards refused to consent to the enlargement, the court held that they had no power to compel him. *Doe v. Powell*, 7 Dougl. 539.

The award.] It is not necessary to the validity of an award that it should be in any precise form of words; it is enough if it appear that the arbitrator has finally decided on the matters submitted to him. *See Bradbee v. Gov. Christ's Hospital*, 8 Dougl. N. C. 164. And where by the terms of the submission the arbitrator was to have a view, before he made his award, and he had a view accordingly, it was holden not necessary to state this in his award. *Spence, Eastern Counties Railway Co.* 7 Dougl. 697. But where a matter in difference was referred, and the arbitrator after having examined into it, wrote a letter to the parties in which, after making some observations, he said, "I propose Mr. V. should pay Mr. L. 10*l.*," this was holden not to be an award; it was merely a recommendation. *Lock v. Vulliamy*, 5 B. & Ad. 600. Care, however, must be taken that the award pursue the submission; that it decide on all the matters referred to the arbitrator, and no more; that it be, and appear to be, a final settlement of all these matters; and

that it be drawn up with great certainty. Care must also be taken that the award be made and published within the time limited for that purpose by the submission, or the time to which it is enlarged. These several qualities of an award shall be considered fully, when we come to notice the defects, for which an award may be set aside. Where the time for making it has been enlarged, it is usual, though not always necessary, *George v. Lowsley*, 8 East, 13, to state that fact upon the face of the award.

Care should be taken that it be properly stamped; for although a defect in this respect is not a ground for setting the award aside, *Preston v. Eastwood*, 7 T. R. 95, yet it cannot legally be enforced. Even the officer who is to draw up the rule for the attachment may refuse to do so, on this ground. *Hill v. Slocombe*, 9 Dowd. 339. The stamp is 35s.; and if it contain 30 sheets of 72 words each, or upwards, it must have an additional stamp of 25s. for every 15 sheets above the first fifteen. 55 G. 3, c. 184. See *Boyd v. Emmersen*, 4 Nev. & M. 99.

In some cases where a verdict is taken at *nisi prius*, in order to save the expense of an award, it is merely required of the arbitrator to certify the amount of the damages for which the verdict shall be entered up. This he may do at any time, if there be nothing in the terms of the reference which obliges him to certify within any limited time; there is no rule of practice which requires him to certify before the return of the jury process. *Salter v. Yeates*, 2 Cr. & M. 67. This certificate should indicate exactly the manner in which the *postea* is to be drawn up, in the same manner as if a verdict had been given: if both parties be entitled respectively to verdicts on different issues, it should state it; *Woof v. Hooper*, 4 Bing. N. C. 449; or if an issue is to be taken distributively, and part found for one party, part for another, it should point out the manner in which the verdict is to be entered. Cases illustrative of this, will be mentioned, when we come to treat of the defects for which an award may be set aside. No order of *nisi prius* is necessary, where the arbitrator is thus empowered to certify. *Thoms v. Hawkes*, 8 Law J. 214, *qb*.

An award is said to be made, as soon as it has been signed by the arbitrator. And it is said to be published, as soon as the arbitrator has apprized the parties that it is ready for delivery. *Musellbrook v. Dunkin*, 9 Bing. 605. *McArthur v. Campbell*, 5 B. & Ad. 518. *Brook v. Mitchell*, 6 Mees. & W. 473. See S. C. 8 Dowd. 392, *semb. cont*.

The instant an arbitrator makes and publishes his award, he is *functus officio*, and cannot afterwards alter it. *Ward v. Dean*, 3 B. & Ad. 234. But if he alter it, and the alteration be in an immaterial part, that will not vitiate the award. *Treo v. Burton*, 1 Cr. & M. 533. So an alteration by an umpire of

the sum awarded, after he had given notice of the award, though on the same day, and before the delivery of it, was holden void; but the award was holden good for the original sum awarded, which was still legible. *Henfree v. Bramley*, 6 East, 309. However the court, with the assent of the parties, may send the award back to the arbitrator if he have made any mistake which may be amended. See *Bird v. Penrice*, 9 Law J. 257, ex. *Ferguson v. Norman*, 4 Bing. N. C. 52.

Costs.] If there be no cause in court, and the submission be silent as to costs, the arbitrator cannot award them. If it contain any specific directions as to costs, the arbitrator must award the costs accordingly. If it state that the costs are to be in arbitrator's discretion, he may allow them to the party in whose favour he makes his award, or he may omit all mention of them as he may think fit.

If there be a cause in court, the arbitrator may award the costs of the cause, as consequent upon his authority to determine the cause itself, although the submission give him no authority upon the subject; *Roe v. Doe*, 2 T. R. 644; and this, although not only the cause, but all other matters in difference, be referred. *Whitehead v. Firth*, 12 East, 165. *Firth v. Robinson*, 1 B. & C. 217. He cannot give costs as between attorney and client, but as between party and party only. *Marder v. Cox*, *Cowp.* 127, and see *Bartle v. Musgrave*, 1 Dowl. N. C. 325. He usually awards the costs, generally, to be taxed by the proper officer; and the costs are thus taxed in the same manner precisely as if a verdict were given to the same effect as the award. See *Allenby v. Proudlock*, 5 Nev. & M. 636. *Rigby v. Okell*, 7 B. & C. 57. If by the submission the costs are to be in the discretion of the arbitrator, he can give them only to that party in whose favour he makes the award. *Finlayson v. M'Leod*, 1 B. & A. 663. If the costs are to abide the event, then if the arbitrator award entirely in favour of one party, or if he award upon different issues, some in favour of one party, some in favour of the other, the costs follow and are taxed, in the same manner as if the finding were by verdict. *Daubuz v. Rickman*, 1 Hodg. 75. But if he award partly in favour of one party, and partly in favour of the other, without reference to the issues, and in such a way that it cannot be said in whose favour he has decided, he cannot give costs to either. *Boodle v. Davies*, 4 Nev. & M. 788. *Yates v. Knight*, 1 Hodg. 368. In one case where costs were to abide the event, and the award, instead of deciding the cause in favour of either, directed all proceedings in the cause to cease, and that one should pay to the other 6*l.*, but made no award as to costs, the award was holden to be bad, as not being final. *Re Leeming & Fearsby*, 5 B. & Ad. 403. But where the award decides the cause in favour of one party or the other, and the costs

re to abide the event, there it is immaterial whether the award give the costs to such party, or be altogether silent on the subject; for in either way, the officer of the court would award the costs for the party succeeding. *Jupp v. Grayson*, 1 Cr. M. & R. 523. And where in such a case, the award ordered the costs to be paid at a specified time, the court held that the award was not bad on that ground, as the clause might be rejected as surplusage. *Cockburn et al. v. Newton*, 9 Dowl. 676. The event, means the legal event of the cause; and therefore where an action by an administrator, in which some of the counts in the declaration were upon promises to himself, was referred to arbitration, the costs to abide the event, and an award was made in favour of the defendant: the court held the plaintiff to be personally liable for the costs. *Spivy v. Webster*, 2 Dowl. 46. And see *Ratcliffe v. Hall*, 2 Cr. M. & R. 258. So, where several actions were referred, "the costs of the several actions and of all matters and things relating hereto" to abide the event of the award, it was holden to mean that the costs in each action were to abide the event of the award as to that action; and the arbitrator having ordered the costs in each action to be paid to the successful party in each suit respectively, the award was holden good, although the same party had not succeeded in all the actions. *Jones v. Piggell*, 6 Dowl. 483. So, where there are several issues, and the costs of the action are to abide the event, the arbitrator ought to award as to what issues he finds for the plaintiff, what for the defendant, that the master may tax the costs accordingly. *Bourke v. Lloyd*, 2 Dowl. N. C. 452, 12 Law J. 4, 22. *Woolfe v. Cooper*, 6 Dowl. 617. So, where a cause in which the defendant had paid 10*l.* into court, was referred, together with all other matters in difference, the costs to abide the event, and the arbitrator awarded that the plaintiff had no cause of action beyond the 10*l.* paid into court: it was holden that the plaintiff was liable to the costs. *Dawson v. Garrett*, Dowl. 624. So, formerly, if an action of assault, where no justification was pleaded, were referred, and the award were for damages under 40*s.* the plaintiff should have no more costs than damages. *Swinglehurst v. Altham*, 3 T. R. 138, and see *Hard v. Mallinder*, 5 East, 489. On the other hand, if in respass or case a power be given to the arbitrator to certify in the same manner as a judge at *nisi prius*, he may certify that the action was brought to try a right, and so entitle the plaintiff to costs, although he award damages under 40*s.* *Spain v. Cadell*, 9 Dowl. 745; if he do not certify, the plaintiff will not be entitled to costs. So, if the award be under 40*s.*, where the defendant would in ordinary cases be entitled to his costs under a court of requests Act, he shall have his costs in like manner under the award. *Butler v. Grubb*, *cit.* 3 T. R. 179. But where particular costs are allowed upon verdict by

statute, an award is not deemed equivalent to a verdict in such a case, and the party in whose favour the award is made, would not be entitled to such costs, but merely to costs as in ordinary cases. See *Barnard v. Moss*, 1 H. Bl. 107. *Gurney v. Butler*, 1 B. & A. 670.

As to the costs of the reference: if nothing be said in the submission about them, the arbitrator cannot include them in his award. *Bradley v. Tunstow*, 1 B. & P. 34. *Firth v. Robinson*, 1 B. & C. 277. *Strutt v. Rogers*, 7 Taunt. 213. But if the costs generally are to abide the event, he may. *Wood v. O'Kelly*, 9 East, 436. see *Mackintosh v. Blyth*, 1 Bing. 269. Where the costs of the reference are to abide the event, this means the event of the award generally, without relation to the issues; *Duckworth v. Harrison*, 8 Law J. 41, ex.; they are not like the costs of the action, which may depend upon the arbitrator's finding with respect to the different issues. See *Bourke v. Lloyd*, ante, p. 249. In what cases they are deemed costs in the cause, see *Tregoning v. Atterbury*, 7 Bing. 738. *Taylor v. Lady Gordon*, 1 Dougl. 720. *Bignall v. Gale*, 1 Dougl. N. C. 497. Where the arbitrator, as to the costs of the reference, ordered by his award that one third should be paid by the plaintiff and two thirds by the defendant: the master, after taxing the costs of both parties, added those of the plaintiff (68*l.*) to the costs of the defendant, (45*l.*) making together 113*l.*, and taking two thirds, (75*l.* 6*s.* 8*d.*), made his allocatur of this as the sum to be paid by the defendant to the plaintiff: but this was holden to be wrong; two thirds of the plaintiff's costs (45*l.* 6*s.* 8*d.*) less one third of the defendant's (15*l.*) being 30*l.* 6*s.* 8*d.*, was the sum the defendant was to pay as his share of the costs of reference. *Wallon v. Ingram*, 10 Law J. 188, cp. See also *Day v. Norris*, 11 Law J. 62, ex.

As to the costs of the award, they are deemed part of the costs of the reference, and follow the same rules. If the arbitrator give up the award without payment of these costs, it is very doubtful whether the law affords him any remedy for them: the court will not interfere in his favour; *Burroughs v. Clarke*, 1 Dougl. 48; and it is very doubtful whether he can maintain an action for them. See *Virany v. Warne*, 4 Esp. 46. *Swinford v. Burn*, 1 Gow. 7. In order to ensure payment, the award usually requires the successful party to pay them, and the other party to repay him a moiety or the whole. See *Hicks v. Richardson*, 1 B. & P. 93. *Stokes v. Lewis*, 2 Smith, 12. If on the other hand the arbitrators charge what the party may deem to be too much, the court have no jurisdiction to order them to take less, or, after being paid, to order them to refund any portion of their fees. *Dossett v. Gingell*, 2 Man. & Gr. 870. As to the taxation of these costs, see *Bignall v. Gale*, 1 Dougl. N. C. 497, 2 Man. & Gr. 830.

If the arbitrator make any mistake in his award as to costs,

the award, although bad as to that, may be good for the residue. *Aitchison v. Cargay*, 9 Moore, 381.

Where the master refused to tax the costs upon an award, upon the ground that the time had not elapsed, within which an application might be made to set it aside, the court upon application ordered him to tax them. *Little et al. v. Newton*, 1 Man. & Gr. 976.

Costs for delaying the proceedings, &c.] In all references by rule of court, order of nisi prius or judge's order, the rule or order contains a provision that if either party, by affected delay or otherwise, shall wilfully prevent the arbitrator from making his award, he shall pay such costs to the other as the court shall think reasonable and just. And before the late statute, 3 & 4 W. 4, c. 42, s. 39, already noticed (*ante*, p. 239), if a party to such a reference revoked the submission without a reasonable cause, the court would oblige him to pay the other party's costs of the reference. See *Smith v. Fielder*, 2 Dowl. 764. *Aston v. George*, 2 B. & A. 395. And the court, upon application, will still oblige a party to pay costs occasioned by any wilful delay upon his part in proceeding upon the reference. See *Morgan v. Williams*, 2 Dowl. 123. *Gladwin v. Chilcote*, 9 Dowl. 550. The mode of proceeding is by application to the court, upon affidavit, for a rule nisi.

Enforcing the award.

On a submission by deed, &c.] If there be no cause pending in court, and the submission do not contain the clause of consent that it shall be made a rule of court, the mode of enforcing the award is by action of debt on the bond of submission; or by action of covenant, if the submission be by any other deed; or by assumpsit, if the submission be by agreement not under seal, or by parol; or by debt on the award, if the award be for the payment of money only. Or, where the submission is in writing, and contains the clause of consent above mentioned, the party, in whose favour the award is made, may have his remedy upon it by attachment. *Vide infra*.

Where a cause is referred at nisi prius.] Where a cause is referred at nisi prius, and a verdict taken subject to an award, the party in whose favour the award is afterwards made, may have the postea indorsed on the nisi prius record accordingly; and may, without any personal service of the award, but merely serving it in the ordinary way upon the attorney of the opposite party, sign judgment and sue out execution, without any previous application to the court. *Lee v. Lingard*, 1 East, 401. *Borrowdale v. Hitcheney*, 3 B. & P. 244. See *Grundy v. Wilson*, 7 Taunt. 700. If the award be for a

greater sum than the amount of damages given by the verdict, the court will not amend the declaration and verdict, by increasing the damages, so as to give the plaintiff the full benefit of his award; see *Pearse v. Cameron*, 1 M. & S. 675; but they will allow the judgment to be entered for the amount of the verdict; or if the judgment by mistake be entered up for the greater sum, they will amend it, by reducing it to the sum laid as damages in the declaration. *Prentice v. Reed*, 1 Taunt. 151. Where the award was lost, the court of Common Pleas allowed judgment to be signed, upon an affidavit of its contents. *Hill v. Townsend*, 3 Taunt. 45. Where the award is not published or the certificate not delivered to the associate, until after the time at which the party would be entitled to judgment if the cause had not been referred, the court upon a special application, and a proper case made out by affidavit, would probably allow the judgment to be entered *nunc pro tunc*. See *Brooke v. Fearn*, 2 Dowl. 114, and see R. G. H. 4 W. 4, r. 2, s. 3.

Where the submission is by rule of court or judge's order.] Where the submission is by rule of court, or by a judge's order which is afterwards made a rule of court, the party may have his remedy for non-performance of the award by attachment, as for a contempt of the court in not obeying the rule. *Vide infra*. Or if, as is sometimes the case, the rule or judge's order directs, that the party in whose favour the award shall be made, shall be at liberty to sign final judgment for the amount, tax costs, and sue out execution, he may do so, without any previous application to the court; even a defendant may do so, if the award be in his favour. *Maggs v. Yorston*, 6 Dowl. 481. As the remedy by attachment, however, is a very general one, and requires to be treated in detail, it may be convenient to do so here under a separate head.

Attachment for non-performance of an award.

In what cases.] Where the submission is by rule of court, or by an order of nisi prius or judge's order which is afterwards made a rule of court, or by a bond or agreement, &c. containing the clause of consent already mentioned, and which is accordingly afterwards made a rule of court, the award may be enforced by attachment. But the award must contain an order by the arbitrator to pay the money or do the act awarded; for otherwise, the not doing of it will be no breach of the rule, and the court cannot grant an attachment; *Edgell v. Dallimore*, 3 Bing. 634. *Scott v. Williams*, 3 Dowl. 508. *Hopkins v. Davies*, 1 Cr. M. & R. 846. *Deanad v. Howey*, 7 Dowl. 318; merely stating that A. is indebted to B. in a certain sum, *Id.* or directing a verdict to be entered for

the party, where the arbitrator has no authority to do so, *Donlan v. Brett*, 4 *New. & M.* 854, is not equivalent to it. So, where by agreement A. was to purchase certain lands of B, at a certain price to be fixed by an arbitrator, and the arbitrator accordingly awarded a certain sum as the price: it was holden that an attachment would not lie for the non-payment of the money. *Re Lee & Hemingway*, 3 *New. & M.* 860. So, a party shall not recover interest on the sum awarded to him, by attachment. *Churcer v. Stringer*, 2 *B. & Ad.* 777. And the court will never grant an attachment, where an action is pending on the same award, even although the plaintiff offer to waive the action; *Bailey v. Loveday*, 1 *B. & P.* 81; unless the party will consent to discontinue and pay the costs, before he sues out the attachment. *Paull v. Paull*, 2 *Cr. & M.* 235. But where a plaintiff, to whom a sum of money was awarded, filed an affidavit of debt in the court of bankruptcy under stat. 1 & 2 *Vict. c. 110, s. 8*, for the amount, and a bond with sureties was accordingly given, but no action was in fact brought: the court held that he was not thereby precluded from enforcing the award by attachment. *Mendell v. Tyrrell*, 9 *Mees. & W.* 217. On the other hand, where the plaintiff obtained an attachment first, and arrested the defendant upon it, but finding the defendant obstinate, and that he would not pay the money, he commenced an action against him upon the award: the court ordered the defendant to be discharged, upon his giving the plaintiff a bond with sureties, in the nature of a bail bond, to the satisfaction of the master. *Earl Lonsdale v. Whinney*, 1 *Cr. M. & R.* 591. In one case, the court of Common Pleas granted an executor an attachment for non-performance of an award made in favour of his testator; *Rogers v. Stanton*, 7 *Taunt.* 575; but in a subsequent case, the court of King's Bench ruled otherwise. *R. v. Maffey*, 1 *Dowl.* 538. Nor will the court grant an attachment to a person who is a stranger to the submission, although the award order a sum of money to be paid to him. *Re Skeele et al.* 7 *Dowl.* 618. But they will grant it against an executor, where it appears from the pleadings in the action referred that he would have been personally liable, if a verdict had been found against him. *Spiry v. Webster*, 2 *Dowl.* 46. And where it is awarded that one party shall pay the costs of the award, and that the other shall repay him the whole or a moiety thereof, then if the one pay the amount, he may compel the other by attachment to repay him his portion. *Hicks v. Richardson*, 1 *B. & P.* 93. *Stokes v. Lewis*, 2 *Smith*, 12. And the court will grant an attachment for not performing an award, although it appear that the party reside out of the jurisdiction of the court. *Hopcraft v. Fermor*, 1 *Bing.* 379. But they will not grant an attachment, after a long time has elapsed from the making of the award, at least not without an affidavit accounting for the delay. *Storey v.*

Garry, 8 Dowl. 299. Nor will they in any case grant it against a peer, *Walker v. Earl Grosvenor*, 7 T. R. 171, or member of parliament, *Cutmer v. Knatchbull*, 7 T. R. 448, for non-performance of an award.

Making the submission a rule of court.] Where the submission is by order of nisi prius or judge's order, or by bond or agreement containing the consent already mentioned, the first step in proceeding for an attachment for non-performance of the award, is, to make the order or other submission a rule of court. Unless this be done, the court cannot grant the attachment, even although the opposite party offer to waive the objection. *Owen v. Hurd*, 2 T. R. 643. The motion for this purpose, is a motion of course. *If the submission be by an order, you have merely to annex it to a motion paper; if by a bond, &c. annex to it an affidavit of its due execution, and inclose it in a motion paper: then give them to counsel to move, and afterwards draw up the rule. In vacation you can obtain a judge's fiat for the rule; and upon taking it to the office, together with a motion paper signed by counsel, you may obtain the rule. If by the award or submission you are entitled to costs, get an appointment to tax upon the rule, give notice, and proceed to the taxation, as in ordinary cases.* Where the arbitrator refused to give up an order of reference, that it might be made a rule of court, *Patteson, J.* allowed a duplicate of it to be used for the purpose. *Thomas v. Philby*, 2 Dowl. 145. If there be an attesting witness to the submission, and he refuse to make an affidavit of the signing or execution of it, the court will in general compel him; but the affidavit, and his expenses of swearing to it, must be previously tendered to him: *Exp. Pike*, 1 Dowl. N. C. 275. If the time for making the award were enlarged by indorsement on the judge's order or other submission, or otherwise, the enlargement, as well as the submission, must be made a rule of court; otherwise the court will not grant an attachment. *Jenkins v. Law*, 8 T. R. 87. *Smith v. Blake*, 8 Dowl. 130. and see *Dickins v. Jarvis*, 5 B. & C. 528.

Service and demand, &c.] A copy of the rule and allocatur, and a copy of the award, *Laugher v. Laugher*, 2 Crompt. & J. 398, 1 Tyr. 352, must be personally served upon the party intended to be attached, and the original rule and allocatur must at the same time be shown to him. The court will not dispense with personal service in any case; *Read v. Forre*, 1 Chit. 170. *Brander v. Penleaze*, 5 Taunt. 813. *Richmond v. Parkinson*, 3 Dowl. 703. but see *Re Bower*, 1 B. & C. 264; if the award however be against two, and one of them be personally served, but a personal service on the other be found impracticable, the court will grant the attachment against the one served. *Richmond v. Parkinson*, 3 Dowl. 703.

Attachment for non-performance of the Award. 255

A personal demand of the money or other matter awarded, must also be made upon the party intended to be attached; otherwise the court will not grant an attachment for not performing the award, even although the time and place for payment be specified in the award. *Brandon v. Brandon*, 1 B. & P. 394. And if it be money which is to be demanded, the demand must be made by the party entitled to the money, &c. Or if it be inconvenient for him to make the demand, he may depute any other person by a power of attorney to make it for him; and in such a case, a copy of the power of attorney must be personally served, and the original shown to the party, at the time the demand is made. *Laugher v. Laugher*, 1 Tyr. 352, 2 Crompt. & J. 398. But where the award is for costs only, a demand by the party's attorney, without a power of attorney, will be sufficient, even although the award do not expressly make the costs payable to the attorney; for he is the party *prima facie* entitled to them, when paid. *Per Hobroyd, J. Ms. T. 1820, K. B.* Or if any thing but money is to be demanded, as if for instance the execution of a deed is to be demanded, then a power of attorney is unnecessary, but any person otherwise authorized by the party, may make the demand. *Tebbutt v. Ambler*, 12 *Law J.* 220, *qb.* If more be demanded than is awarded, the court will not grant an attachment, even for the sum awarded. *Strutt v. Rogers*, 7 *Taunt.* 213, and see *Payner v. Hatton*, 8 *Dowl.* 891. And where the award ordered A. to complete a purchase of certain land, and to pay the purchase money to B. on B. conveying the land to him with a good title, the court refused an attachment for non-payment of the money, on an affidavit merely of a demand of the money, and of a statement at the same time made of the party's readiness to convey, but where no conveyance, executed, was actually tendered. *Standley v. Hemington*, 6 *Taunt.* 561. It is not necessary, however, that the demand should be on the very day appointed by the award for the payment of the money, or the doing of the thing awarded; it may be made on or after it. *Re Craike et al.* 7 *Dowl.* 603.

Affidavit, motion, &c.] The affidavit must state the making of the award by the arbitrator, and the time of making it, see *Wohlenberg v. Lageman*, 6 *Taunt.* 254, and the award itself must be annexed. Also, if the time for making the award were enlarged, the affidavit must show that it was regularly enlarged, that the defendant had notice of the enlargement, and that the award was made within the enlarged time; *Id.* *Davis v. Vass*, 15 *East*, 97. *Moule v. Stawell*, 15 *East*, 99 *n.* and see *Halden v. Glasscock*, 5 B. & C. 390. *Hilton v. Hopwood*, 1 *Marsh.* 66. *Trew v. Burton*, 1 Cr. & M. 533; but where the enlargement was by indorsement on the order of

reference, and the order was made a rule of court, it was holden not necessary to state that the indorsements were duly made; *Dickins v. Jarvis*, 5 B. & C. 528. *Barton v. Ranson*, 3 Mees. & W. 322; the enlargement being made a rule of court, it must be presumed that there had been an affidavit of such enlargement having been duly made; and if there were in fact no such affidavit, the court upon application would set aside the rule, making the order &c. a rule of court. *Id.* & S. C. 6 Dowl. 384. If the enlargements be indorsed upon a part of the submission which is in the possession of the opposite party, the court on application will oblige him to have it made a rule of court. *Smith v. Blake*, 8 Dowl. 130. The affidavit must then state a personal service of copies of the rule and allocatur and award, and that the original rule and allocatur were at the same time shown to the party; and the rule and allocatur should be annexed. It must then state a personal demand of the money or other thing awarded and a refusal or neglect to pay it, &c.; and if the demand were under a power of attorney, it must state it, must annex the power of attorney, the attesting witness must swear to its due execution, *Laugher v. Laugher*, 1 Tyr. 352, 2 Cr. & J. 398, the affidavit must state that a copy of such power of attorney was served upon, and the original shown to, the party, at the time the demand was made; *Id.*; and in such a case, the party himself should swear that he has not received the money, &c.; and the affidavit should show, generally, that the money, &c. still remains unpaid, &c. See *Gifford v. Gifford, Forrest*, 80. If there be a cause in court, the affidavit should be intitled in it; *Doe v. Stillwell et al.* 6 Dowl. 305; but otherwise, if the submission have been made a rule of court under the statute. *Bainbrigge v. Houlton*, 5 East, 21. And the same as to the affidavits in answer. *Id.* but see *Bevan. v. Bevan*, 3 T. R. 601.

Upon this affidavit, &c. get counsel to move for a rule nisi for an attachment. Against this rule, the other party may show as cause, that the award is illegal and bad on the face of it, *Hutchins v. Hutchins, Andr.* 297, even although the time may have elapsed for moving to set aside the award for such an objection. *Pedley v. Goddard.* T. R. 73. Or he may show that the money is not due, according to the terms of the award. But where an award dated the 13th October, 1840, ordered the payment of a sum of money on the 28th day of October next, and upon an application for an attachment in Michaelmas term 1840, it was objected that "October next" must mean October 1841: the court held that the word "next" applied to the day as well as the month, and as the meaning of the award evidently was that the money should be paid on the 28th of the same month in which the award was made, they granted the attachment. *Brown v. Smith*, 8 Dowl. 867.

But he will not be allowed to set up any other objection to the award in answer to the rule. *Holland v. Brooks*, T. R. 161. *Per Ld. Mansfield in Lucas v. Wilson*, 2 Bur. 701, & see *M'Arthur v. Campbell*, 4 Nev. & M. 208. *Paull v. Paull*, 2 Cr. & M. 235. *Rowe v. Sawyer*, 7 Dowl. 691. Having a cross demand against the party who has obtained the rule, is no answer to it. *Smith v. Johnson*, 15 East, 213. Even corruption in the arbitrator, is no answer to it. *Brazier v. Bryant*, 3 Bing. 167. If the party have objections to the award, not appearing upon the face of it, he should move to set it aside. From two recent cases, however, it appears that where there is a doubt as to the validity of an award, the court will neither enforce it by attachment, nor set it aside, but leave the party to his remedy by action. *Burley v. Stevens*, 4 Dowl. 770. *Thornton v. Hornby*, 8 Bing. 13.

If the award be for costs only, and direct them to be paid by several persons in equal proportions, there must be a separate attachment against each. *Gulliver v. Summerfield*, 5 Dowl. 401.

Execution for the sum awarded.

Where the award is for the payment of money only, another remedy may be had, by applying to the court for a rule ordering the party to pay the money, and then suing out execution by *fi. fa.* or *ca. sa.* upon the rule, under stat. 1 & 2 Vict. c. 110, s. 18, as directed *post* p. 311. In order to do this, the submission and enlargements must be made a rule of court, in the same manner as upon moving for an attachment. You then move for a rule to show cause why the defendant should not pay to the applicant the sum awarded, upon an affidavit of service of the award and *allocatur* upon the defendant; *Pearson v. Archbold*, 12 Law J. 230, *ex.*; and upon that being afterwards made absolute, you may sue out execution, as you may upon any other rule for the payment of money. *Doe v. Amoy*, 8 Mees. & W. 565. It was at one time thought that execution might at once be sued out upon the award, without a rule. But this was afterwards holden not to be the case, by the court of Queen's Bench, *Jones v. Williams*, 11 Ad. & El. 175, and the court of Exchequer, *Jones v. Williams, et al.*, 8 Mees. & W. 349, and the practice since adopted was then suggested. It is not necessary, in the rule *nisi*, to call upon the defendant to show cause why the applicant should not be at liberty to issue execution, or to state that he foregoes his remedy by attachment; *Burton v. Mendizabel*, 1 Dowl. N. C. 336; it is merely necessary to call upon him to show cause why he should not pay the money. The rule *nisi* should be served personally, *Jordan v. Berwick*, 1 Dowl. N. C. 271, unless from circumstances it appear necessary to the court to

dispense with such a service. *Id.* and see *Doe v. Squire*, 2 *Dowl. N. C.* 327.

In showing cause against the rule, the party may object to the award, for any defect appearing upon the face of it, in the same manner as he may upon a motion for an attachment. *Kerr v. Liston*, 1 *Dowl. N. C.* 340. So, it should seem that it would be a good cause to show that the applicant had already brought an action to recover the same sum of money, and that the action was still pending. But it is no answer to such an application, that the applicant had filed an affidavit of debt in the court of bankruptcy under stat. 1 & 2 Vict. c. 116, s. 8, for the same sum, and that the defendant had given a bond with sureties, if no further proceedings have been taken upon it. *Mendell v. Tyrrell*, 9 *Mees. & W.* 217.

If upon showing cause, the award appear bad upon the face of it, or if the validity of it appear doubtful, the court will not grant the rule. *Spence v. Clarkson*, 1 *Dowl. N. C.* 837.

Setting aside the award.

[*When and how.*] In all cases where the submission has been made a rule of court under stat. 9 & 10 W. 3, c. 15, application may be made at any time before the last day of the term next after the award or umpirage thereon shall be made and published, to set it aside for corruption, or undue practice of the arbitrator, 9 & 10 W. 3, c. 15, s. 2, or other cause; *Zachary v. Shepherd*, 2 T. R. 781; and it must be made within that time, for the court will not entertain it afterwards, *Freame v. Pinneger*, *Cowp.* 23, *Ridley v. Goddard*, 7 T. R. 73. See *Re Perring & Keymer*, 3 *Dowl.* 98, even for objections appearing on the face of the award, *Lowndes v. Lowndes*, 1 *East*, 276, and even although a portion of the delay was caused by the opposite party improperly preventing the submission being made a rule of court. *Smith v. Blake*, 8 *Dowl.* 133. Even where the rule nisi had been obtained the last day but one of the term, but it was sought to be amended, for the purpose of using an affidavit sworn on the last day of term: *Littledale, J.* held that it could not be done, as by the statute the motion and rule must be before the last day of term. *Re Holloway & Monk*, 8 *Dowl.* 138. Where a cause pending was referred, not by rule or judge's order, as is usually done, but by agreement containing the clause of consent according to this statute, it was holden to be a case within the statute, and that a motion to set aside the award should be made within the time above-mentioned. *Rushworth v. Barron*, 3 *Dowl.* 317. 1 *Har. & W.* 122. The time here limited is computed from the day the award is published, that is, from the day on which notice of it is given to the parties.

Musellbrook v. Dunkin, 1 Dowl. 722. Where it was published after the essoin day and before the *quarto die post* of the term, this was holden to be within the term, and consequently that the party had until the last day of the next following term, to move to set it aside; *Re Burt*, 5 B. & C. 668; but it is very doubtful whether it would be holden so now, as the terms are fixed to commence on particular days by stat. 11 G. 4 & 1 W. 4, c. 70, s. 6.

Where the submission is by rule of court or judge's order, although it does not come within the above statute, yet, in analogy to the statute, the court require the motion to set aside an award in such a case to be made before the end of the term next after the publishing of the award. *M'Arthur v. Campbell*, 2 Nev. & M. 444. *Potter v. Newman*, 4 Dowl. 504, and see *Worrall v. Deane*, 2 Dowl. 261. But as the court are not bound by the statute in these cases, they will not insist rigidly upon the rule thus laid down by them, if a sufficient case be made out to induce them to entertain the motion at a later period. *Rogers v. Dallimore*, 6 Taunt. 111. *Hobbs v. Ferrars*, 8 Dowl. 779. It has been holden, however, to be no excuse, that the party did not obtain the award in time, owing to the arbitrator demanding an exorbitant sum for his award. *M'Arthur v. Campbell*, 5 B. & Ad. 518. See also *Emet v. Ogden*, 7 Bing. 258. *Hayward v. Philips*, 1 Nev. & P. 298. *Kennard v. Harris*, 2 B. & C. 801.

If the submission be by order of *nisi prius*, and a verdict taken, a party intending to move to set aside the award or certificate of the arbitrator, must do so within the time allowed for moving for a new trial, unless a sufficient reason for delay be shown; *Rawsthorne v. Arnold*, 6 B. & C. 629. *Borrowdale v. Hitchen*, 3 B. & P. 244. *Thompson v. Jennings*, 10 Moore, 110; and this, even although the objections all appear upon the face of the award. *Sell v. Carter*, 2 Dowl. 345. So where the arbitrator ordered a verdict to be entered or 25*l.*, and then stated certain facts for the opinion of the court, and directed that if the court should be of opinion on these facts that the verdict should be for 125*l.* only, the damages should be reduced to that sum: the court held that motion to enter the verdict for the latter sum, should have been made within the regular time for setting aside the award. *Anderson v. Fuller*, 4 Mees. & W. 470. This rule however, is not to be deemed imperative, although the court usually require a strong case to justify their departure from the practice established by it. *Sherry v. Oke*, 1 Har. & W. 119. And it is confined to cases where the cause only is referred, and does not extend to cases where there is a reference of the cause and all matters in difference. *Moore v. Butlin*, 7 Ad. & El. 595. *Hayward v. Phillips*, 6 Ad. & El. 119. *Allenby v. Proudlock*, Dowl. 54, per Coleridge, J. see *Lyng v. Sutton*, 5 Dowl. 39

cont. But if the judgment signed upon the verdict in such a case, be irregular, by reason of some defect appearing upon the face of the award, the party may move to set aside the judgment, although the time for impeaching the award may have elapsed. *Manser v. Heaver*, 3 B. & Ad. 295. And the same, where a judgment is signed in pursuance of a submission by judge's order or rule of court. *Doe v. Horner et al.* 8 Ad. & El. 235.

In the rule *nisi* must be stated all the objections to the award, intended to be insisted upon at the time of making such rule absolute. *R. E.* 2 G. 4, K. B; *R. M.* 10 G. 4, r. 3, C. P.; 11 *Price*, 57. And this rule extends also to cases where merely a certificate, and not an award, has been given by the arbitrator. *Carmichael v. Houchen*, 3 Nev. & M. 203, *Whalley v. Morland*, 2 Cr. & M. 347. The objections must be stated in the rule, with certainty and precision; it is not sufficient to say, generally, that the arbitrator has exceeded his authority, or that the award is uncertain or not final, *Boodle v. Davies*, 4 Nev. & M. 788. *Gray v. Leaf*, 8 Dowl. 654, or that the arbitrator had made his award under a misapprehension of the terms of the reference, *Allenby v. Proudlock*, 4 Dowl. 54, or the like. But stating that the arbitrator has not awarded on a matter in difference submitted to him, has been deemed sufficient. *Dunn v. Warters*, 9 Mees. & W. 293: Where however, a verdict is taken subject to an award, and a judgment is irregularly entered thereon, it is not necessary, in moving to set aside that judgment, to state the grounds of objection, although they arise upon the face of the award. *Manser v. Heaver*, 3 B. & Ad. 295. Or if the motion be made upon affidavit, and the objections be there stated, it is not necessary to state them in the rule. *Rawsthorne v. Arnold*, 6 B. & C. 629.

Previously to moving to set aside the award, the order or agreement of submission must be made a rule of court. But it seems that it is not necessary, though usual, to make the enlargements a part of the rule; *Re Welsh et al.* 1 Dowl. N. C. 331; although it is otherwise, we have seen, (*ante* p. 254,) when it is intended to enforce the award. The rule must be drawn up, on reading the rule by which the matter was referred, *Christie v. Hamlet*, 5 Bing. 195, and a copy of the award. *Sherry v. Oke*, 1 Har. & W. 119, 3 Dowl. 349.

In the court of Queen's Bench, cause cannot be shown against this rule, on the last day of term, but the rule must be enlarged until the term following. *R. M.* 36 G. 3. And the practice is the same in the Common Pleas, *Signall v. Gale*, 2 Man. & Gr. 830, and Exchequer.

For what defects an award will be set aside.

It may be necessary to premise, that an award may be bad in part, and good for the residue, *Manser v. Heaver*, 3 B. & Ad. 295. *Addison v. Gray*, 2 Wils. 293. *Hetherington v. Robinson*, 8 Law J. 148, ex. *Winter v. Lethbridge*, *M'Clell*: 253. *Doe v. Richardson*, 8 Taunt. 697. *Morgan v. Smith*, 1 Dowl. N. C. 617, if the parts can be treated as distinct and separate. It may be necessary to premise also, that in considering an award, upon an application to set it aside, the court will make no distinction between legal and other arbitrators, or treat the awards made by the one in any manner differently from those made by the other. *Jupp v. Grayson*, 1 Cr. M. & R. 523. *Huntig v. Railing*, 8 Dowl. 879. The objections usually made to awards, may be classed under the following heads:—

Misconduct of the arbitrator.] If an award be obtained by "corruption or undue means," it will be void, and the court shall set it aside; 9 & 10 W. 3, c. 15, s. 2; although it would be no answer to an application for an attachment, *Brasier v. Bryant*, 3 Bing. 167, nor could it perhaps be pleaded to an action on the award, &c. 1 Saund. 327, a (5). So, an award may be set aside, for collusion or any other gross misbehaviour of the arbitrators. *Sturt v. Moggeridge*, 2 Tidd, 894, see *Waltonshaw v. Marshall*, 1 Har. & W. 209. Where an action for the price of a phaeton was referred to a coachmaker, and the question was whether the phaeton was built according to a certain agreement; at the first meeting the plaintiff produced seven witnesses, and requested that they might be examined; but the arbitrator, after inspecting the phaeton, said there was no use in examining witnesses, and ultimately awarded in favour of the defendant: the court, upon application, set aside the award, saying, that although the arbitrator were not guilty of misconduct, in the bad sense of that word, yet he was bound to examine the plaintiff's witnesses. *Phipps v. Ingram*, 3 Dowl. 669, and see *Anon.* 2 Chit. 44. *Pepper v. Gorham*, 4 Moore, 148. *Dodington v. Hudson*, 1 Bing. 384. *Potter v. Newman*, 4 Dowl. 504. So, if an arbitrator proceed *ex parte*, in the absence of one of the parties, the court will in general set aside the award, unless a very strong case of wilful delay on the part of the party not attending, be made out. *Gladwin v. Chilcote*, 9 Dowl. 550. So, where the plaintiff attended before the arbitrator by counsel, without giving notice of it to the defendant, and the latter thereupon prayed an adjournment, that he might have an opportunity also of instructing counsel; but this was refused, unless he would pay the costs of the day, and there was an award against him:

the court set aside the award, saying that it was unreasonable that one party should have the assistance of counsel, and the other not. *Whatley v. Morland*, 2 Cr. & M. 347. So, where all matters in difference between certain parties, were referred to a barrister and two merchants, they or any two of them to make an award; the merchants left a point of law, which arose in the case, wholly to the decision of the barrister, and he and one of the others made the award: the court set it aside, because as to the point of law, it was the decision of one arbitrator only. *Little et al. v. Newton*, 2 Man. & Gr. 351. So, where an umpire, on being chosen, was requested by one of the parties to recall the witnesses and examine them, but he refused to do so, and decided merely upon the notes of the arbitrators, the court set aside the award. *Re Jenkins et al.*, 1 Dowl. N. C. 276. But where an umpire, instead of examining the witnesses, allowed the arbitrators to do so for their respective parties, and received the examinations from them, and he was not requested by the parties to examine the witnesses himself, the court held that this was no objection to the award. *Re Tunno & Bird*, 2 Nev. & M. 328. *Twogood v. Twogood*, *Id.* 335 n. So, re-examining some of the witnesses, in the absence of the parties, *Atkinson v. Abraham*, 1 B. & P. 175, or excluding both parties and witnesses, except the witnesses immediately under examination, *Hendell v. Laycock*, 2 Car. & P. 574. but see *Re Hick*, 8 Tawnt. 694, or not having examined the witnesses upon oath, no objection being made on this account at the time of the examination, *Ridout v. Pye*, 1 B. & P. 91, or refusing an application for a further meeting, after the examination of the witnesses had been finally closed by consent of both parties, *Ringer v. Joyce*, 1 Marsh, 404, if not clearly shown to proceed from a corrupt motive, is no ground for setting aside an award. So, the mere fact of an arbitrator being indebted to the party in whose favour he made his award is not of itself sufficient to set it aside, though the other party were ignorant of the circumstance when the arbitrator was appointed, and as soon as he knew it, objected to the arbitrator's proceeding. *Morgan v. Morgan*, 1 Dowl. 611. So, where the alleged misconduct of the arbitrator was known to the parties three weeks before the award was executed, and no complaint whatever was made upon the subject, the court held that the parties had thereby waived the objection to it. *Bignall v. Gale*, 2 Man. & Gr. 830. So where evidence was received by the arbitrators at a meeting improperly convened, at which neither the plaintiff nor the defendant were present, but the arbitrators swore that they did not consider that evidence in making their award, and that the parties had subsequently proceeded with their case before them: the court refused to set aside the award. *Kingwell v. Elliot et al.*, 7 Dowl. 423, 8 Law J. 241, op.

Mistake in law, &c.] As parties, by submitting their case to arbitration, have chosen to substitute an arbitrator for a court and jury, the court will not set aside an award, or the certificate of an arbitrator, *Price v. Price*, 9 Dowl. 334, for an alleged mistake of the arbitrator, either in point of law or in point of fact, *Wohlenberg v. Lageman*, 6 Taunt. 254. *Boutillier v. Thick*, 1 D. & R. 366. *Wilson et al. v. King*, 2 Cr. & M. 689. *Savage v. Ashwin*, 8 Law J. 43, ex. *Avelett v. Godkard*, 11 Law J. 123, cp. *Delver v. Barnes*, 1 Taunt. 48. *Hade v. Malpas*, 2 Dowl. 638. *Perryman v. Steggall*, Id. 726. *Armstrong v. Marshall*, 4 Dowl. 593, 1 Har. & W. 643. *Symes v. Goodfellow*, 4 Dowl. 642, 2 Bing. N. C. 532, Hodg. 400, whether the arbitrator be a barrister or not, *Jupp v. Grayson*, 3 Dowl. 199. *Ashton v. Poynter*, Id. 201. See 2 Dowl. 651. unless the mistake appear upon the face of the award, *Payne v. Massey*, 9 Moore, 666. *Sharman v. Bell*, 5 M. & S. 504. *Cramp v. Symons*, 1 Bing. 104. *Ames v. Milward*, 2 Moore, 713. See *Bird v. Penrice*, 6 Mees. & W. 754. *Moore v. Bullin*, 7 Ad. & El. 595. *Smith v. Festiniog Railway Co.* 4 Bing. N. C. 23, or on some other paper delivered with it, *Kent v. Elstob*, 3 East, 18. *Jones v. Corry et al.* 5 Bing. N. C. 187, and the law be quite clear upon the point; *Richardson v. Nourse*, 3 B. & A. 237; or unless the mistake be so gross, as to imply misconduct in the arbitrator. *Chase v. Westmore*, 13 East, 357. *Re Hall v. Hinds*, 2 Man. & Gr. 847. Nor can such mistake be amended by the arbitrator himself. *Ward v. Dean*, 3 B. & Ad. 234. *Exp. Cuerton*, 7 D. & R. 774. *Irvine v. Elnon*, 8 East, 54. If the award order an act to be done, which is illegal, the court will set it aside; *Alder v. Savill*, 5 Taunt. 464. *Aubert v. Maze*, 2 B. & P. 371; but if the award appear to be contrary to some rule of practice of the courts merely, the court will not interfere. *Re Balger*, 2 B. & A. 691. But see *Broadhurst v. Darlington*, 2 Dowl. 38, *comb. cont.* If indeed the submission authorise the arbitrator to state the facts specially on his award, and he do so, the court will then decide any point of law which may arise from them. *Jephson et al. v. Hawkins et al.* 2 Man. & Cr. 366. *France et al. v. White et al.* 8 Dowl. 53. *Ferguson v. Norman*, 8 Law J. 3, cp. This however must be deemed merely a permission; it does not bind him to make any such statement. *Wood v. Hotham*, 5 Mees. & W. 674. *Bradbee v. Mayor of London*, 11 Law J. 209, cp. And the arbitrator should refrain from doing this, unless warranted by the submission; where in such a case, he not only stated the facts, but his own judgment also, the court of Exchequer refused to examine the facts, saying that the arbitrator's opinion upon them was final. *Barrett v. Wilson*, 1 Cr. M. & R. 586. *Barton v. Ranson*, 3 Mees. & W. 322. *Wright et al. v. Cromford Canal Co.* 1 Ad. & El. N. C. 98. *Archer v. Owen*, 9 Dowl. 341.

Award not pursuing the submission.] The award must strictly pursue the submission: if the parties submit one thing, and the arbitrator decide another, the award is clearly bad, as not being authorised by the submission. See *Hall v. Alderson*, 2 Bing. 476. Also, if by the terms of the submission, the arbitrator "shall and may" award upon a certain matter, he must. *Cramp v. Adney et al.* 1 Cr. & M. 355. But when the reference was of a cause and all matters in difference, and the award recited it as a reference of the cause only, this was holden to be no ground for setting it aside, or opposing an attachment for not obeying it. *Paul v. Paul*, 2 Cr. & M. 235.

That the arbitrator has exceeded his authority.] Where a cause is referred before trial, or where the submission is silent as to a verdict, the arbitrator has no authority by his award to direct a verdict to be entered; if he do, the court will set aside the award. *Jackson v. Clark*, 1 M'Clel. & Y. 200. *Hutchinson v. Blackwell*, 8 Bing. 331. So, if a cause be referred, with authority to the arbitrator to order a verdict to be entered, if instead of ordering it to be entered for one party or the other, he order a *stet processus*, the court will set aside his award. *Hunt v. Hunt*, 5 Dowl. 442. *Leeming v. Fearnley*, 2 Nev. & M. 232. So if he decide upon a right not claimed, or which has been abandoned, *Hooper v. Hooper*, 1 M'Clel. & Y. 509, *Crowfoot et al. v. London Dock Co.* 2 Cr. & M. 637, and see *Bonner v. Liddell*, 1 Brod. & B. 80, or expressly excluded, *Harris v. Thomas*, 2 Mees. & W. 32, or not included in the submission, *Poyner v. Hatton*, 7 Mees. & W. 211, or decide as to persons who are not parties to the submission, see *Fisher v. Pimbley*, 11 East, 188, or order something to be done upon the land of a third person, who is not party to the submission, *Turner v. Swainson*, 1 Mees. & W. 572, or where costs are in his discretion, and he awards costs as between attorney and client, instead of costs as between party and party: *Succombe v. Babb*, 6 Mees. & W. 129: the award will be set aside, on the ground that he has exceeded his authority. But where the right of two rectors to the tithes of certain lands was referred, with power to devise all means to prevent future litigation between them, it was holden that the arbitrator did not exceed his authority by awarding an undivided moiety of the tithes to each. *Prosser v. Goring*, 3 Taunt. 426. So where authority was given to an arbitrator to decide on what terms a partnership agreement should be cancelled, and he awarded, amongst other things, that one partner should have all the debts, and that he should be at liberty to use the name of the other in suing for them: it was holden that, in giving the power of using the partner's name, he had not exceeded his authority. *Burton v. Wigley*, 1 Bing. N. C. 665, and see *Morley v. Newman*, 5 D.

& R. 317. *Reeves et al. v. McGregor et al.* 9 Ad. & El. 576. So where a verdict is taken subject to the certificate of an arbitrator, he may order a verdict to be entered for the defendants, although no authority be expressly given to him to do so. *Jones v. Hawkes*, 10 Ad. & El. 32; and see *Patch v. Fountain*, 5 Bing. N. C. 442. *Brown v. Watson*, 8 Doucl. 22. So, where in an action brought by the assignees of a bankrupt against a debtor to the estate, all matters in difference were referred, it was holden that the arbitrator did not exceed his authority by awarding that the assignees should refund a portion of a certain sum which the debtor had before paid to them. *Malcolm v. Fullarton*, 2 T. R. 645. So, where a cause was referred, and the arbitrator awarded the plaintiff a greater sum than he claimed by his particulars, but the particulars had not been brought before the arbitrator: the court refused to set aside the award, but they granted a rule nisi to reduce the amount. *Kenrick v. Phillips*, 7 Mees. & W. 415. And even in cases where the arbitrator may have exceeded his authority, if the excess can be separated from the other parts of the award, as, for instance, where he exceeds his authority by awarding costs, that shall not vitiate the award as to the residue. *Aitcheson v. Cargrey*, 9 Moore, 381. *Ward v. Hall*, 9 Doucl. 610. *Re Doddington & Bailward*, 8 Law J. 331, *cp. Cockburn et al. v. Newton*, 10 Law J. 207, *cp.*

That he has not awarded on all the matters referred to him.] Where two distinct matters, with all other matters in difference, are referred, if the arbitrator omit to decide upon one of such distinct matters, that vitiates the whole award; *Randall v. Randall*, 7 East, 81. *Robson v. Railton*, 1 B. & Ad. 723. *Norris v. Daniel*, 2 Doucl. 798. *Wykes v. Shipton*, 3 Nev. & M. 240. *Hayward v. Phillips*, 1 Nev. & P. 288. *Upperton v. Tribe*, 1 Har. & W. 280; and the same, where he refuses or omits to adjudicate between all the parties to the reference. *Winter v. White*, 2 Moore, 723. *Samuel v. Cooper*, 1 R. & W. 86. Where for instance an action on a promissory note, with a count upon an account stated, was referred, and the arbitrator omitted to award as to the count on the account stated: the court set aside the award. *Gisborne v. Hart*, 5 Mees. & W. 50. So, where an action of ejectment was referred, and the arbitrator found that the lessor of the plaintiff was entitled to a part of the lands claimed, setting them out by metes and bounds, but said nothing as to the residue, the award was holden bad, and the judgment signed in pursuance of it set aside. *Doe v. Horner et al.* 8 Ad. & El. 235. So, in trespass, where several issues were joined, and there was judgment by default upon a new assignment, and the venire was as well to try the issues as to assess damages on the new assignment; at the trial a verdict was taken for the plaintiff, subject to the award of an arbit-

trator, who awarded that a verdict should be entered for a certain sum, but took no notice of the new assignment: the award was holden bad, and set aside. *Wykes v. Shipton et al.* 8 Ad. & El. 264 n. *Re Rider et al.* 3 Bing. N. C. 874. *Stone v. Phillips*, 4 Id. 37. *Wood et al. v. Duncan*, 7 Dowl. 91. But it is for the court, in construing the submission, to say whether the matter alleged to be omitted, was one of the matters submitted or not; see *Re Hurst*, 1 Har. & W. 275. *Angus v. Redford*, 12 Law J. 180, ex; and for the party to make out, not only that the arbitrator has omitted to award upon such matter, *Ingram v. Mimes*, 8 East, 445, but that it was brought before him as a matter in dispute, *Martin v. Thornton*, 4 Esp. 180. *Layman v. Gowan*, 1 Law J. 95, cp., and that he did not take it into his consideration. *R. v. St. Katharine's Dock Co.* 1 Nev. & M. 121. Whether the award expressly notice every matter in difference, or not, seems to be immaterial, if the arbitrator have in fact decided upon all matters in difference submitted to him. *Gray v. Gwennap*, 1 B. & A. 106. *Hayllar v. Ellis*, 6 Bing. 225. *Dunn v. Warlters*, 9 Mees. & W. 293. *Wyatt v. Curnell*, 1 Dowl. N. C. 327. *Day v. Bonnin*, 3 Bing. N. C. 219.

That the award is uncertain.] The matter awarded must be stated with certainty, that the party may know what he has to perform, and that the court may see that the arbitrator has not exceeded his authority. Where an action of assumpsit, and all matters in difference, were referred at nisi prius, with power to the arbitrator to direct a verdict to be entered for either party, and the arbitrator directed a verdict to be entered for the plaintiff, without saying for what amount; the court held the award bad for uncertainty, although it also awarded that the defendant was indebted to the plaintiff in 260*l.*; because that sum might have been due with respect to the other matters in difference, and not in the cause, *Martin v. Burge*, 6 Nev. & M. 201. But where in debt on a money bond, the only plea was payment by a co-obligee, and the arbitrator directed a verdict to be entered for the plaintiff, without stating what amount was due upon the bond: the court held the award to be sufficient. *Cayme v. Watts*, 3 D. & R. 224. An award that A. or B. shall do a certain act, is bad for uncertainty. *Lawrence v. Hodgson*, 1 Young & J. 16. But an award directing one of two things to be done, in the alternative, is good; for if one be uncertain or impossible, the party must perform the other. *Simmonds v. Swaine*. 1 Taunt. 549. Where arbitrators awarded that 230*l.* was due to the plaintiff, and that out of that sum 93*l.* should be paid for the expenses of the reference, and for the costs of certain actions due to the plaintiff's attorney: this award was holden to be uncertain and bad, as it did not particularize what portion of the 93*l.* was to be appropriated

to the expenses of the reference, what portion to the costs in each action. *Robinson v. Henderson*, 6 M. & S. 276. Where an award found that certain fixtures of the value of 11l. were wrongfully removed by a lessor of certain premises, and that the lessee should replace them with others, and that the lessor should pay him 11l.: this was holden bad for uncertainty, in not specifying the quality, description or value of the fixtures to be set up by the lessee. *Price v. Parkin*, 10 Ad. & El. 139. So, where an action, in which there were several issues, was referred, and amongst other things the arbitrator awarded that the costs of the several issues should be paid "to the plaintiff or to the party entitled thereto:" the award, as far as related to the costs, was holden to be void for uncertainty. *Hetherington v. Robinson*, 8 Law J. 148, *ex.* So, where an ejectment on several demises was referred, and the arbitrator ordered a verdict to be entered for the plaintiff generally, without saying on which of the demises, the award was holden bad for uncertainty. *Doe v. Hillier*, 12 Law J. 166, *q.b.* But awarding that an executor shall pay a certain sum on a certain day, out of assets in his hands, has been holden sufficiently certain, without expressly stating that he has assets to that amount. *Love v. Honeybourne*, 4 D. & R. 814. So, awarding that two persons should pay a debt, in proportion to their respective shares in a ship, the ratio of their shares not being disputed, has been holden sufficiently certain. *Wohlenberg v. Lageman*, 6 Taunt. 254. And where a cause and all matters in difference were referred, and the award found that nothing was due to the plaintiff, this was holden to be sufficiently certain, being equivalent to a finding that the plaintiff had no right to recover in the action. *Dickins v. Jarvis*, 5 B. & C. 528. *Hayllar v. Ellis*, 6 Bing. 225; and see *Doe v. Richardson*, 8 Taunt. 697. *Cooper v. Landon*, 11 Law J. 223, *ex.* 9 Mees. & W. 60. So, where an action of assumpsit, in which there was a plea of payment of 30l., and of payment into court of 45l., was referred at *nisi prius*, and the arbitrator certified that 74l. 7s. was the proper sum to be paid by the defendant to the plaintiff, this was holden to be equivalent to a verdict for the defendant. *Slater v. Yates*, 2 Mees. & W. 67. So, where an action and all matters in difference were referred, and the arbitrator ordered a verdict to be entered for the plaintiff for 500l., and also awarded him a further sum of 350l. as damages "for grievances not included in the plaintiff's declaration;" the court held that to be sufficiently certain, for it was matter of evidence what matters in difference were laid before the arbitrator. *Wrightson v. Bywater et al.* 3 Mees. & W. 199; and see *Re Brown & Croydon Canal Co.* 9 Ad. & El. 522. Even where an action and all matters in difference were referred, and the arbitrator awarded a gross sum to the plaintiff for his damages in the action, and for the several other matters in difference referred

and submitted to him, without saying how much in respect of the action, and how much for the other matters: this was holden to be sufficiently certain. *Taylor v. Shuttleworth*, 8 Dowl. 281. So, where an award, dated the 13th October, awarded a sum of money to be paid "on the 28th day of October next," the court held that it sufficiently appeared that "next" had reference to the day, not to the month, and that the money was to be paid on the 28th of the same month of October in which the award was dated. *Brown v. Smith*, 8 Dowl. 876. So, where an action of trespass to houses and lands was referred, with power to the arbitrator to settle at what price the defendant should purchase the plaintiff's "property," and the arbitrator fixed a certain price at which the defendant should purchase the plaintiff's said "property," it was holden that this was sufficiently certain, without specifying the property, as that was not a matter in difference. *Round v. Hutton*, 12 Law J. 7, *ex.*

That it is inconsistent.] If one part of an award be inconsistent with another, so as to render it uncertain what is to be performed, the award is bad, and cannot be enforced. Therefore in assumpsit, where the defendant pleaded the general issue, payment, and set off; and the arbitrator, to whom the action and all matters in difference were referred at nisi prius, awarded that a verdict should be entered generally for the defendant, instead of awarding separately on the several issues: the court held the award to be inconsistent and bad, and set it aside. *Fenton v. Dimes*, 9 Law J. 297, *qb. sed vide infra*. But where an action for use and occupation and for goods sold, &c. in which there was a plea of the general issue and a set-off, was referred at nisi prius, and a verdict taken for plaintiff, and the arbitrator was to certify whether the verdict should stand, and for what amount, or whether it should be vacated and a verdict entered for defendant; and he certified that the verdict should be vacated and a verdict entered for the defendant generally: the court held that there was nothing inconsistent in this, for the defendant might not be indebted to the plaintiff, and the plaintiff might be indebted to the defendant, and so both pleas be true. *Williams v. Mouldsdale*, 7 Mees. & W. 134. And see *Cooper v. Langdon*, 9 Mees. & W. 60. *Duke of Beaufort v. Welch*, 10 Ad. & El. 527. *Maloney v. Stackley*, 2 Dowl. N. C. 122, 12 Law J. 92, *cp.* *Duckworth v. Harrison*, 4 Mees. & W. 432.

That it is not final.] Where several matters are referred, and some only decided by the award, we have seen that the award is bad; *supra*; and it is bad, because it is not a final settlement of the matters in difference between the parties. See *Samuel v. Cooper*, 4 Nev. & M. 520. *Ross v. Boards*, 8 Ad. & El. 299.

So, where it was awarded that the defendant should pay a certain sum to the plaintiff, unless he should within twenty-one days exonerate himself from certain payments and receipts, and in that case he was to pay a less sum: this award was holden to be inconclusive and bad. *Pedley v. Goddard*, 7 T. R. 73. So, where the award ordered a verdict to be entered for the plaintiff, and that the defendant should do certain work, and if the plaintiff should be dissatisfied with the work, he might adduce evidence before the arbitrator of its insufficiency, at any time within two months: the court held this latter part of the award bad; but that such part might be rejected, and the award stand good for the residue. *Manser v. Heaver*, 3 B. & Ad. 295. So, where the award merely ordered a nonsuit to be entered, without otherwise adjudicating on the matters in difference, it was holden bad, as not being a final determination of the matter of the suit; and this, although by the terms of the submission he had authority to order a nonsuit. *Wild et al. v. Holt et al.* 9 Mees. & W. 161. So, where all matters in difference between A. & B., partners, were referred, and the arbitrator awarded that A. was indebted to B. 3000*l.* and ordered payment, and that B., on payment thereof, should pay to certain bankers such sum as should be sufficient to release certain deeds of A. which had been pledged to them, but the award did not ascertain what that sum was: the court held that the award was not final on that point, and therefore bad. *Hewitt v. Hewitt*, 1 Ad. & El. N. C. 110. And see *Re Marshall*, 12 Law J. 104, *qb.* But where two parties agreed to be bound by the opinion of a barrister, and he gave his opinion in favour of one of them: this was holden to be final, although it recommended that a printed statute should be compared with the parliament roll before the matter was settled, under a doubt whether the statute was not misprinted. *Price v. Hollis*, 1 M. & S. 105. So, where a cause and all matters in difference were referred, and the arbitrator awarded as to all, except a certain claim by the plaintiff for a loss on hats, and as to that claim he found that no sufficient evidence was laid before him to show that any loss had been sustained, up to that time: this was holden to be sufficiently final. *Cockburn et al. v. Newton*, 2 Man. & Gr. 899. So, an award that certain actions shall be discontinued, and each party pay his own costs, is final and good, being in effect an award of a *stet processus*. *Blanchard v. Lilly*, 9 East, 497, *Hawkins v. Colclough*, 1 Burr. 274. And see *Yates v. Knight*, 2 Bing. N. C. 277. So, where a suit and all matters in difference were referred, and the award found that the plaintiff had no demand upon the defendant with respect to the action or on any other account whatsoever, this was holden sufficiently final, although the suit was not thereby put an end to in terms. *Jackson v. Yabsley*, 5 B. & A. 848. *Harding v. For-*

shaw, 1 *Mees. & W.* 415. And see *Eardley v. Steer*, 2 *Cr. M. & R.* 327. *Steepel v. Bonsall*, 2 *Har. & W.* 11. *Dibbin v. Marq. of Anglesea*, 2 *Cr. & M.* 722. So, where the declaration was for two distinct causes of action, and the award ordered a general verdict for the plaintiff for a certain sum, this was holden sufficiently certain, without awarding specifically as to each cause of action. *Bird v. Cooper*, 4 *Dowl.* 148. See *Gyde v. Boucher*, 2 *R. & W.* 127, 5 *Dowl.* 127. *Duckworth v. Harrison*, 4 *Mees. & W.* 432. *Savage v. Ashwin*, 4 *Mees. & W.* 530. *Cooper v. Langdon*, 9 *Id.* 60. *Malony v. Stockly*, 12 *Law J.* 92, *cp.* On the other hand, where two actions, in which there were several issues, were referred, and the arbitrator found separately on the several issues, without stating that the finding terminated the suits: the court held the award to be sufficiently final. *Allen v. Loure*, 12 *Law J.* 115, *qb.*

That it is void.] If an award be void, the court will not on that ground set it aside, if nothing can be done upon it without suit or application to the court; but if the party can enforce it, without applying to the court to enable him to do so, as for instance, if the award order a verdict to be entered, there the court will set it aside, for otherwise the party might proceed to judgment and execution upon it. *Doe v. Brown*, 5 *B. & C.* 384. And see *Preston v. Eastwood*, 7 *T. R.* 95.

For perjury or fraud.] The court will not set aside an award, although the affidavit in support of the application disclose strong imputations upon the testimony of a material witness, who was examined before the arbitrator. *Scales v. East London Waterworks Co.* 1 *Hodg.* 91. Nor will the court set aside an award, on the ground that the order of reference has been fraudulently obtained; the application ought to be to set aside the order of reference, and should be made within due time after the order was obtained. *Sackett v. Owen*, 2 *Chit.* 39.

BOOK VI.

RULES, JUDGES' ORDERS, ETC.

SECTION I.

Affidavits.

a draft of the affidavit; and having corrected and engrossed it on plain paper, and have it sworn either in before a judge or commissioner.

Following is a general form :

Queen's Bench [or "Common Pleas," or "Exchequer"]

Between John Nokes, plaintiff,
and

Joseph Styles, executor of the last
will and testament of John Styles,
deceased, defendant.

Styles, of Russell Square, in the County of Middlesex,
t, the above-named defendant, Henry Smith, of Furness,
Holborn, in the County of Middlesex, gentleman,
for the said defendant, George Dunn, clerk to the said
Smith, and James Fraser, clerk to Thomas Andrews, of
Fleet-street, in the city of London, attorney at
law, make oath and say : And first, "this deponent,
Styles, for himself, saith that," [&c.]; "And this
deponent further saith that," [&c.] "And this other deponent,
Smith, for himself, saith that," [&c.] "And this deponent,
George Dunn, for himself, saith that," [&c.] "And this
deponent, James Fraser, for himself, saith that," [&c.] "And
this deponent, Joseph Styles, for himself, further saith that,"
"And these several deponents, Joseph Styles, Henry
George Dunn, and James Fraser, further say that,"

rn" [if in court] "in court this
y of — 1843.

Sworn" [if before a judge] "at
nbers in Serjeant's Inn, Chan-
ce, this — day of — 1843,
e

J. S.
H. S.
G. D.
J. F.

or, "Sworn" [if before a commissioner] "at — in the county of —, this — day of — 1843, before me,
L. M.

a commissioner of the
said court of Queen's Bench" [C. P. or
E. of P.]

or, "affirmed" [instead of "sworn,"
as above, if the party be a Quaker.]

If sworn by two or more persons, the jurat must be thus:]
The above-named deponents, Joseph Styles, Henry Smith, George Dunn, and James Fraser, were severally sworn [&c. as above.]

If sworn before a commissioner, by a markman, or person who from his signature, appears to be illiterate, the jurat must be thus:] "Sworn at — in the county of — this — day of — 1843, before me; and I hereby certify that the above affidavit was read in my presence to ' [the deponent], ' and that he seemed perfectly to understand the same, and that he [made his mark, 'or' wrote his signature] thereto in my presence."

L. M.

A Commissioner of," &c.

Title of the court.] In strictness, in all cases, the affidavit should be intituled in the court in which it is to be used. *Osborne v. Tatum*, 1 B. & P. 271. But if there be any other thing on the face of the affidavit, which sufficiently indicates the court in which the affidavit is to be used, it is usually deemed sufficient. If sworn before a judge of the court, it may be read, although not intituled. *R. v. Hare*, 13 East, 189. And by *R. G. H. 2 W. 4, s. 4*, "an affidavit sworn before a judge of any of the courts of King's Bench, Common Pleas or Exchequer, shall be received in the court to which such judge belongs, though not intituled of that court; but not in any other court, unless intituled of the court in which it is to be used." So, where an affidavit was sworn before the filacer, and used in the court of which the filacer was an officer, it was holden sufficient, although not intituled of the court; *Bland v. Drake*, 1 Chit. 165; and the same, if sworn before a commissioner, and he states himself in the jurat to be a commissioner of the court. *R. v. Hare*, 13 East, 189; and see *Urquhart v. Dick*, 3 Dowl. 17. And even where an affidavit is sworn in Scotland, before a commissioner, who describes himself in the jurat as a commissioner of the courts of Exchequer and Common Pleas in England, the court of Exchequer held that it might be used in either of the courts, although not intituled; *White v. Irving*, 2 Mees. & W. 127; and that it might be intituled of the court in which it was to be used, after it was sworn. *Perse v. Browning*, 1 Mees. & W. 362.

Where an affidavit was intituled "In the Common Place," instead of "In the Common Pleas," it was holden sufficient. *Rolfe v. Burke*, 4 Bing. 101. Where a prisoner, in the custody of the sheriff of a county under process from an inferior court, was removed into the custody of the marshal by a *habeas corpus cum causa*, affidavits intituled "In the King's Bench," were holden by that court to be properly intituled, although it was objected that, as the *habeas* was directed to the sheriff, and not to the judge of the inferior court, the body alone was removed, and not the cause. *Perrin v. West*, 1 Har. & W. 401. 5 Nev. & M. 291.

Title of the cause.] If the affidavit be made in a cause in court, it must be intituled correctly in the cause; otherwise it cannot be used. Even where a cause is removed by certiorari from an inferior court, all affidavits in it afterwards must be intituled in the cause. *Franks v. Wicks*, 9 Dowl. 489. So, where an award is made in a cause, even the affidavit of the execution of a power of attorney to demand performance of the award, must be intituled in the cause. *Doe v. Stilwell*, 6 Dowl. 305. And the courts require great particularity in the manner of doing it. Therefore where the affidavit was intituled *C. D.* "at the suit of" *A. B.*, instead of *A. B.* against *C. D.*, Gurney, B. held it to be bad. *Richard v. Isaac*, 1 Cr. M. & R. 136. So, if the title state the surname only, and not the christian name, of the plaintiff or defendant, the affidavit will be bad. *Clothier v. Ess*, 2 Dowl. 731. *Fores v. Diemar*, 7 T. R. 661. *Anderson v. Baker*, 3 Dowl. 107. And where in the title of an affidavit in an action on a bill of exchange, the initial merely of the defendant's christian name was given, it was holden that it should be accompanied by an affidavit that the defendant had signed the bill in the same way. *Hilbert v. Wilkins*, 8 Dowl. 139. So, in an action by or against two or more persons, if the title of the affidavit state the christian and surname of one, with the words "and another," or "others," the affidavit will be bad. *Doe v. Wunt*, 8 Taunt. 647, 2 Moore, 722. *Doe d. Prynne et al. v. Roe*, 8 Dowl. 340. *Bullman v. Callow*, 1 Chit. 727. Or if in ejectment on several demises, the affidavit be intituled "John Doe on the demise of *C. v. Richard Roe*," it will be insufficient. *Doe d. Cousins et al. v. Roe*, 7 Dowl. 53. So, where it was Doe "on the demise or demises" of *A. B. & C. D.*, it was holden bad. *Doe v. Lloyd*, 12 Law, J. 95, *qb.* But where process, which now in all cases is non-bailable, is sued out against several, an affidavit made by any one of them, before declaration, may be intituled *A. B. v. C. D.* who is sued with *E. F.*, *Mackenzie v. Martin*, 6 Taunt. 286, or in a cause of *A. B. v. C. D.* only; *Dand. v. Barnes*, 6 Taunt. 5; for until declaration, it cannot be known who will be defendants in the action, the plaintiff having it in his power to declare against

some of the several persons mentioned in the writ. Where, in the title of an affidavit, in an action on a bail bond, the plaintiff was named Phillips, "assignee, &c." without stating of whom, &c. the affidavit was holden bad; *Phillips v. Hutchinson*, 3 Dowl. 20. *Casley v. Smith*, 4 Dowl. 477. *Steyner v. Cottrell*, 3 Taunt. 377; and the same where the defendant was designated "executor &c."; *Clark v. Martin*, 4 Dowl. 222, and see *Ender v. Twiden*, 8 Law J. 128, cp.; and the like, where a party sues or is sued in *auter droit*, and the title of the affidavit makes no mention of the character in which the party sues or is sued. *Wright v. Hunt*, 1 Dowl. 457. Even where the title omitted the word "defendant," the affidavit was holden bad. *Harris v. Griffith*, 4 Dowl. 289. 1 Har. & W. 515. Where there are two persons, father and son, of the same name with the plaintiff or defendant, and the action is brought by or against the father, it is usual, but not necessary, to add "the elder" to his name, in the title of the affidavit; and the omission of "the elder" in the title of an affidavit, therefore, is not material, although in all the former proceedings in the cause he is so described. *Singleton v. Johnson*, 9 Mees. & W. 67. *Young v. Young*, 1 Dowl. N. C. 865. But where a party is described as "the younger" in the proceedings, he must be so described in the title of an affidavit in the cause. Where, however, upon a motion to set aside proceedings on a bail bond, the title of the affidavit designated the plaintiff "Gentleman one, &c." and on the other side there was an affidavit that the plaintiff was not an attorney, the court held that the words, Gent. one, &c. might be rejected as surplusage, and allowed the affidavit to be used. *Reeves v. Crisp*, 6 M. & S. 274.

But where there is no cause in court, the affidavit should not, of course, be intituled in one, or if so intituled it cannot be read; and therefore, where the cause is pending in another court, as in an application for a certiorari; *Ex p. Nokro*, 1 B. & C. 267; or where no cause is as yet pending, as in applications for criminal informations, *R. v. Robinson*, 6 T. R. 642, and in showing cause against them: *R. v. Harrison*, 6 T. R. 60: the affidavits should not be intituled in a cause, but merely in the court. So, in moving to set aside an award, where no action is pending, the affidavits for or against the motion must not be intituled in any cause; *Bainbridge v. Houlton*, 5 East, 21; and even where the submission has been made a rule of court, the affidavits in a motion for an attachment for not obeying the award, need not be intituled in any cause, *Bevan v. Bevan*, 3 T. R. 601, but the affidavits in answer must. *Id. sens. sed qu.* In the court of Exchequer, it is no objection to a motion, to enter up judgment on a warrant of attorney, that the affidavits are not intituled in the cause, because as yet there is no cause in court; *Davis v. Stanbury*, 3 Dowl. 440; and

the same in the court of Common Pleas. On the other hand, in the court of Queen's Bench, it is no objection that they are intitled, because the warrant of attorney is of itself an admission that there is a cause in court. *Sowerby v. Woodroff*, 1 B. & A. 567. Perhaps in both courts the affidavit may be in either way.

In some particular cases, there are certain peculiarities, which have only to be noticed to be attended to. In an application to set aside proceedings on a bail bond, the affidavit, in the Queen's Bench, *Kelly v. Wrother*, 2 Chit. 109, and Exchequer, *Stride v. Hill*, 1 Mees. & W. 37. *Lisle v. Chetwoode*, 2 Tyr. 177, may be intitled either in the original cause, or in the action against the bail; but in the Common Pleas it seems that it is only when the bail bond has been irregularly assigned, that the affidavit can be intitled in the original cause; in other cases, it must be intitled in the action against the bail. *Ham v. Philcox*, 1 Bing. 142. 7 Moore, 521. *Blackford v. Hawkins*, 7 Moore, 600. But where an application was made to set aside the *ca. sa.* against the principal and a writ of summons against the bail, and the affidavit was intitled in both actions, the court of Exchequer held that it was properly intitled. *Pocock v. Cockerton*, 8 Law J. 3, *ex.* So, if several rules be moved for in different actions on the same affidavit, the affidavit may be intitled in all the actions. *Barrack v. Newton*, 1 Ad. & El. N. C. 525. If an application be made in two cases, the affidavits may be intitled in both. *Pitt v. Evans*, 2 Dowd. 226. In error, the affidavits are intitled in the original cause, until the transcript is sent over; but after that, they must be intitled in the writ of error. *Gandell v. Rogier*, 4 B. & C. 862. And the like, after the removal of a cause by a writ of false judgment. *Watson v. Walker*, 8 Bing. 315. Where a sheriff obtained a rule for an interpleader, and an issue was directed between the claimant and the execution creditor, but the claimant relinquished his claim two days before the issue was to have been tried: in an application against the claimant for costs, it was holden that the affidavits ought to be intitled in the original action, and not in the issue. *Elliot v. Sparrow*, 1 Har. & W. 370. In moving for an attachment against the sheriff, the affidavit must be intitled in the cause; *Etherington v. Kemp*, 1 Chit. 727, *n.*; in other cases the affidavit is so intitled or not, according as the matter of complaint arises out of a cause in court or otherwise. *Bevan v. Bevan*, 3 T. R. 601. So, in showing cause against a rule for an attachment, *Whitehead v. Firth*, 12 East, 165, and generally, in attachments in civil suits, all affidavits used before the attachment actually issues, *Wood v. Webb*, 3 T. R. 253, must be intitled in the suit. But when the attachment once issues, all affidavits afterwards used in the matter, as in motions to set aside the attachment or the like, must be intitled at the suit of the Queen against the party attached, *R. v. Sheriff of Middlesex*,

7 T. R. 439, 527. *Wood v. Webb*, 3 T. R. 253. R. v. *Sheriff of Middlesex*, 2 Mees. & W. 107, which title will be sufficient, even in the case of an attachment against the sheriff, without adding the name of the cause, although it is certainly convenient to do so. R. v. *Sheriff of Middlesex*, 5 B. & C. 389. In an application against an attorney, requiring him to deliver up papers, the affidavit may be intituled in the cause out of which the claim is alleged to have arisen. *Simes v. Gibbs*, 6 Dowl. 310. In ejectment, where the declaration contains both joint and several demises, the affidavits may be intituled, Doe on the several demises of the lessors of the plaintiff (naming them) against the defendant, without distinguishing the joint from the several demises. *Doe v. Roe*, 5 Dowl. 447. In an application to discharge a defendant or cancel the bail bond, or set aside a *distringas*, or the like, on the ground of misnomer, the affidavits must be intituled in the action as it is, until appearance, *Borthwick v. Ravenscroft*, 5 Mees. & W. 31, but after that, with the defendant's real name, "sued by the name" in the writ. *Finch v. Cocker*, 2 Dowl. 383. In the court of Common Pleas, it is in the latter form in both instances. *Jones v. Elridge*, 1 Dowl. N. C. 710. And in an application to set aside a *ca. sa.* on the ground of a variance between it and the previous proceedings, in the name of the defendant, the affidavit was intituled according to the names in the *ca. sa.*: the court held that it was wrongly intituled, and discharged the rule. *Thorpe v. Hook*, 1 Dowl. 494. But in other cases the affidavit must be intituled strictly in the cause, otherwise it cannot be read. *Shrimpton v. Carter*, 3 Dowl. 648. Where affidavits intituled in a cause, were in fact made before the cause was actually in court, but not used until afterwards, they were holden sufficient. *Read v. Massie*, 4 Dowl. 681. In applying for a *capias*, if the affidavit have been sworn before the summons was sued out, it need not be intituled in the cause; if made after the issuing of the summons, it must. *Schletter v. Cohen*, 7 Mees. & W. 389. An affidavit of verification, annexed to a plea, and referring to it, need not be intituled in the cause, if the plea be so. *Prince v. Nicholson*, 5 Taunt. 333. So, an affidavit of verification of the sheriff's notes, in moving for a new trial of a cause tried before the sheriff upon a writ of trial, if it be written at the foot of the notes and on the same paper, need not be intituled in the cause, if the notes be so. *Doctor v. Stanley*, 9 Law J. 199, *cp.*

Deponent's addition.] By R. G. H. 2 W. 4, s. 5, "the addition of every person making an affidavit, shall be inserted therein." Even where bail make an affidavit of their sufficiency, the affidavit must state their addition, although fully stated in the notice of justification; the rule now mentioned being deemed general. *Brown's bail*, 5 Dowl. 220. *Morgan*

1 *Gale*, 15; and see *Thurly v. Faber*, 1 *Chit.* 466, in addition is of two kinds; the residence of the plaintiff and his rank or degree in life, his profession or trade, and these must be stated with sufficient certainty. *Turner*, *Smith v. Younger*, 3 *B. & P.* 550, and "*Mercatier v. Alderson*, 3 *M. & S.* 166, have been holden

So, "attorney" or "agent" for the above named plaintiff or defendant is sufficient. *Luxford v. Groombridge*, 5 *V. C.* 332. 12 *Law J.* 99, *qb.* But where the deponent is described as "assessor," it was holden insufficient. *Cohen*, 1 *Har. & W.* 107. 3 *Dowl.* 370. Where the affidavit of an attorney and his clerk, having given the full addition of the attorney, added "and C. D. his clerk," it was objected that no addition was given to the clerk. *Coleridge, J.* held it to be sufficient. *Bottomley v. Bottomley*, 1 *Har. & W.* 362. 4 *Dowl.* 26. So, where an attorney and his clerk, in an affidavit, described himself as clerk to &c. (describing his master's place of business), the affidavit was holden sufficient. *Strike v. Blanchard*, 5 *Dowl.* 216. *Same*, where he described himself as A. B. of 21 Tottenham Yard, in the city of London, clerk to C. D. of the same name, although he did not state the profession of his master, the affidavit was holden sufficient. *Cooper v. Folks*, 1 *Man. & Gr.* 912. But where he described himself as clerk to the defendant's attorney, without giving the residence or place of business of his master, the affidavit was holden bad. *Daniels v. May*, 5 *Dowl.* 83. So a deponent describing himself as "late clerk to," &c. was holden sufficient. *Simpson v. Drummond*, 2 *Dowl.* 473. So, where a deponent was a prisoner in the Fleet, &c. merely describing himself as such, was holden to be a sufficient addition, although at the time he made the affidavit he was out on bail. *Sharp v. Johnston*, 2 *Bing. N. C.* 246, 4 *Dowl.* 324. *Same*, as to a prisoner in the custody of the sheriff. *Jones*, 1 *Har. & W.* 654. 4 *Dowl.* 610.

When the plaintiff or defendant in a cause make an affidavit, they must describe themselves as "the above named plaintiff" or "defendant;" *Jackson v. Chard*, 2 *Dowl.* 468. *Pembrey*, 1 *Dowl.* 693. *Brooks v. Farlar*, 5 *Dowl.* 361; *Thier*, 5 *Mees. & W.* 163. *Shiver v. Walker*, 2 *Man. & Gr.* 17; although this was formerly doubted, *Jervis v. Har. & W.* 654, 4 *Dowl.* 610, and in one case in the *exchequer* ruled otherwise. *Lawson v. Case*, 1 *Cr. & M.* 481. A deponent described himself as "of Kennington, in the county of Surrey, the above named plaintiff," it was held that as Kennington was a district containing upwards of 100 inhabitants, the description was uncertain and bad. *Wilton v. Chambers*, 1 *Har. & W.* 6. The addition given must be true: this was ex-

pressly required by the former rule of court upon the subject (*R. M. 15 C. 2 B. R.*); and although the word "true" is omitted in the above rule, there is little doubt that the court would hold it to be implied. Where, prior to the present rule, a party, in an affidavit to hold to bail, described himself as "of Dorset Place, Clapham Road, *Middlesex*," the court on application discharged the defendant out of custody, on an affidavit that the deponent's place of residence was in Surrey, not in Middlesex. *Collins v. Goodyer*, 2 B. & C. 563. In an affidavit of merits, it must appear that the deponent is either the defendant himself, or the defendant's attorney, or the attorney's managing clerk, having the management of the cause; *Neesom v. Whytock*, 3 Taunt. 403. *Morris v. Hunt*, 1 Chit. 97. *Anon. 1 Smith*, 61; the affidavit of any other person will not be sufficient. *R. v. Sheriff of Middlesex*, 1 Chit. 732.

Where there are several deponents in an affidavit, and a proper addition is given to some, but not to others, it may become a question whether the whole affidavit is not thereby vitiated. In one case of this kind, Patteson, J. held, that a misdescription of one deponent only, rendered the affidavit bad as to him, but that the statements of the others were still admissible. *Nathan v. Cohen*, 3 Dowl. 370. But in another case, before the full court of King's Bench, the contrary was holden, Lord Denman, C. J. saying that the court could not go through the affidavit, to see how much one swore, and how much another. *R. v. JJ. of Carnarvonshire*, 5 Nev. & M. 364.

Body of the affidavit.] In drawing an affidavit, besides having it properly intituled, and stating the names and additions of the deponents correctly, care must be taken to state the facts in a manner so plain, unequivocal and explicit, that the court or opposite party shall not be able to give any other meaning to the statement, than such as the deponent intended to convey, without giving the words a very forced construction. Particular care should also be taken to give dates to all the material facts, where necessary, and to give them with sufficient certainty. So, the facts themselves must be stated with sufficient particularity: it will not be deemed sufficient to make general statements, where the particulars evidently lie within the deponent's knowledge. And therefore, in an application that the master shall review his taxation, it is not sufficient to state that the master's taxation is erroneous, or the like, but the objectionable items, and the grounds of objection, must be distinctly shown. *Daniel v. Bishop, M'Clel.* 61; and see *Williams v. Hunt*, 1 Chit. 321. There is no objection, however, to stating a matter hypothetically, which is not within the knowledge of the deponent, but upon which a material

fact within his knowledge is founded. And therefore an affidavit by the warden of the Fleet, that an escape ("if any such escape there was") was without his knowledge, was holden good. *West v. Eyles*, 2 *W. Bl.* 1059. The omission of a word may often render an affidavit uncertain and bad; as for instance, where an affidavit of service of declaration in ejectment, stated that the deponent delivered to the tenant "a true" (omitting the word copy) "of the declaration," it was holden bad. *Anon* 1 *Chit.* 562, n. So, stating that the deponent "maketh" (omitting the word oath) "and saith," &c. the omission was holden to vitiate the affidavit. *Oliver v. Price*, 3 *Dowl.* 261. *Doe v. Clark*, 12 *Law J.* 69, *qb.* Also, care must be taken not to state any unnecessary matter, and to state that which is necessary as concisely as is consistent with perspicuity and certainty. If there be any unnecessary prolixity in the affidavit, which will have the effect of charging the other party unnecessarily with costs, the court will probably refer it to the master to ascertain what part of the affidavit was unnecessary, and make the party using such affidavits pay the costs. *Lewis v. Woolrych*, 3 *Dowl.* 692. *Exp. Henllam*, 7 *Price*, 594.

An affidavit of merits must state that the defendant has "a good defence to the action upon the merits." See *Pringle v. Marsack*, 1 *D. & R.* 155; saying that "he is advised and believes" that he has a good defence on the merits, is not sufficient. *Worthington v. —*, 2 *Cr. M. & R.* 315. But swearing to the facts of the defence, and those appearing to constitute a good defence upon the merits, has been deemed equivalent to it. *Johnson v. Berrisford*, 2 *Cr. & M.* 222.

It is essential also to an affidavit, that it should allege that the deponent "maketh oath and saith" in the present tense; the omission of the word "oath," *Oliver v. Price*, 3 *Dowl.* 261, and using "said" for "saith," *Howarth v. Hubbersty*, 3 *Dowl.* 455, 1 *Gale*, 47, have been holden to be fatal defects. And where any thing is stated, which the deponent has merely heard from another party, he must always add to it, "and which information this deponent verily believes to be true," or words to that effect.

Signature.] The affidavit must be signed by the deponent, either by signing his name, if he can write, or by making his mark if he cannot. And in signing his name, there is no objection to his signing merely the initial or initials of his christian name. Where an affidavit was objected to, because it was signed in some unknown character, *Patteson, J.* held it to be no objection; the deponent was sworn, no doubt, in the usual way, "you swear that this is your name and handwriting." *Nathan v. Cohen*, 1 *Har. & W.* 107, 3 *Dowl.* 370. Where the affidavit is resworn, it is not necessary that it should

be signed a second time by the deponent. *Liffen v. Pitcher*, 1 Dowl. N. C. 767.

Jurat.] The affidavit, if sworn in this country, may be sworn either in court, or before a judge at chambers or elsewhere, or before one of the commissioners appointed by the court for taking affidavits; or, in the case of an affidavit to hold to bail, before the officer who signs or issues the process. In Scotland and Ireland, commissioners have also been appointed, by the courts in this country, in pursuance of stat. 3 & 4 W. 4, c. 42, s. 42, for the purpose of taking affidavits to be used in these courts. And an affidavit to hold to bail, not intitled in any court, but sworn in Scotland before a commissioner, who in the jurat stated himself to be a commissioner by virtue of a commission from the courts of Common Pleas and Exchequer, was holden to be a sufficient affidavit to hold to bail in the Exchequer. *White et al v. Irving*, 2 Mees. & W. 127. Previously to this statute, an affidavit made in Ireland or Scotland, before a judge, *Exp. Worsley* 2 H. Bl. 275, or justice of the peace, *Turnbull v. Morton*, 1 Chit. 463, 721, *Watson v. Williamson*, 1 Dowl. 607, might be used in the courts in this country, if the signature of such judge or justice were properly authenticated by an affidavit made here. But whether an affidavit, so sworn, or sworn in any other manner than before a commissioner, would now be admitted, has not been determined. Where an affidavit to hold to bail, sworn in Ireland, and purporting to be sworn before a commissioner of the court of Common Pleas of that country, was made use of in the court of Common Pleas here, the court declined to decide the point, whether an affidavit, sworn before any other than a commissioner of that court in Ireland, could be used here, but discharged the defendant out of custody, on account of there being no affidavit authenticating the signature of the commissioner. *Sharp v. Johnston*, 2 Bing. N. C. 246, 4 Dowl. 324, 1 Hodg. 298. Affidavits also made in foreign countries, before mayors or other magistrates there, *Dalmer v. Barnard*, 7 T.R. 251, attested and certified by a notary public, *Exp. Worsley*, 2 H. Bl. 275, may be used in the courts of this country. And it is no objection that it is in the foreign language, if it be translated, and the translation verified. *Re Eady et al* 6 Dowl. 615. But it is very doubtful whether an affidavit, sworn before a British Consul abroad, can be used in the courts in this country; *Pickardo v. Machado*, 4 B. & C. 886; not at least unless it be shown that there was no mayor or other magistrate in the place. *Riddell v. Nash*, 8 Moore, 632.

Affidavits sworn before the courts, when sitting in bank, can only be used in the court in which they are sworn. But affidavits made before a single judge, at chambers or elsewhere, may be used in any of the courts: in the court of which he is

a judge, whether intituled of that court or not; or in another court, if intituled of that court. *R. G. H. 2 W. 4, s. 4, ante, p. 272. See Phillips v. Drake, 2 Dowl. 45. R. v. Hare, 13 East, 189.* If in such a case there be any defect in the jurat, the court or judge will order it to be rectified. *See Exp. Smith, 2 Dowl. 607.*

If the affidavit be sworn before a commissioner, he must either state in the jurat, or it must appear from some other part of the affidavit, that he is a commissioner of the court, or the affidavit must be intituled of the court; otherwise it cannot be used. *R. v. Hare, 13 East, 189. Howard v. Brown, 1 Bing. 393.* If it be intituled in the court, and he state himself in the jurat to be a commissioner, although he do not say of what court, it will be sufficient. *Burdekir v. Potter et al., 3 Mees. & W. 13.* So, if it be not intituled in the court, but the commissioner in the jurat describe himself as a commissioner of the court, it will be sufficient.

But where in an affidavit in the Exchequer, the commissioner described himself as a master extraordinary in the High Court of Chancery, it was holden that the affidavit could not be used. *Frost v. Hayward, 10 Mees. & W. 673.* So, an affidavit intituled in the court of Queen's Bench, but appearing to be sworn before a commissioner of the court of Exchequer, cannot be used. *Shaw v. Perkin, 1 Dowl. N.C. 306.* It must also state where it was sworn, *R. v. JJ. of W. R. Yorkshire, 3 M. & S. 493*; the county as well as the particular place, *R. v. Cockshaw, 2 Nev. & M. 378. Boyd v. Straker, 7 Price, 662,* in order that it may appear on the face of the affidavit in what county an indictment for perjury may be preferred, if necessary. But where it was "at Cheltenham aforesaid," the deponent being before described as of Cheltenham, in the county of Gloucester, it was holden sufficient. *Grant v. Fry, 8 Dowl. 234.* Also, if the deponent be a marksman, or otherwise from his signature appear to be illiterate, the commissioner in the jurat shall certify that the affidavit was read, in his presence, to the party making the same, and that such party seemed perfectly to understand it; and also that the party wrote his signature in the presence of the commissioner. *R. E. 31 G. 3, K. B.; R. H. 40 G. 3, Exch.; R. T. 1 G. 4, Exch. See Haynes v. Powell, 3 Dowl. 599. Wilson v. Blakey, 9 Dowl. 352.* Where, in an affidavit in the Exchequer, sworn before a commissioner, it was certified that a third person had read over and explained the affidavit to the deponent: the court held it to be insufficient, as it ought to have been read over to him by the commissioner himself. *R. v. Shff. of Middlesex, 4 Dowl. 765.* And lastly, in all cases, excepting affidavits to hold to bail, the commissioner must not be the attorney of the party on whose behalf the affidavit is to be used; otherwise it cannot be read. *R. E. 15 G. 2, K. B. R. v. Wallace, 3 B. R. 403. Jenkins v. Mason, 3 Moore, 325. Hopkinson v.*

Buckley, 8 Taunt. 74. *Batt v. Vaisey*, 1 Price, 116. See *Horsfall v. Matthewman*, 3 M. & S. 154. But the objection must, it seems, be substantiated by affidavit; *Hodgson v. Walker*, *Whitw.* 62; or by the admission of the party; *Haddock v. Williams*, 7 Dowl. 327; and it must show, not only that he is the attorney of the party, but that he was so at the time the other affidavit was sworn. *Beaumont v. Dean*, 4 Dowl. 354. To come within this rule, however, the commissioner must be, not merely the law adviser of the party generally, but his attorney in that particular business. *Williams v. Hockin*, 8 Taunt. 435. Formerly this rule was considered as applying only to the attorney on the record; and therefore, where the London agent was the attorney on the record, it was holden that it was no objection to an affidavit of the client, that it was sworn before the country attorney. *Read v. Cooper*, 5 Taunt. 89. But now, by *R. G. H. 2 W. 4, s. 6*, "where an agent in town or an attorney in the country is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk, shall not be received, in cases where it would not be receivable if sworn before the attorney himself: but this rule shall not extend to affidavits to hold to bail." Where a rule nisi to set aside a judgment in ejectment, and that the landlord should be admitted to defend the action, was obtained upon an affidavit sworn before a clerk of the landlord's attorney: Coleridge, J. held it not to be a case within the above rule; for at the time of swearing the affidavit, the landlord was no party to the record. *Doe v. Roe*, 5 Dowl. 409. By the same rule also, *s. 3*, "no affidavit of the service of process shall be deemed sufficient, if made before the plaintiff's own attorney or clerk."

And in all cases, the jurat must state the day on which the affidavit is sworn; *Doe v. Roe*, 1 Chit. 228; otherwise it shall not be read; or if a rule nisi have been obtained upon it, it shall be discharged with costs. *Blackwell v. Allen*, 7 Mees. & W. 146.

Also, if there be any interlineation or erasure in the jurat, the affidavit shall not be read or made use of. *R. M. 37 G. 3, K. B.* See *Jacob v. Hungate*, 3 Dowl. 456, *Exch.* And where an attorney's clerk, without any fraudulent motive, altered the date in the jurat of an affidavit, on which a judge's order had been obtained, the court upon application set aside the judge's order. *Finnerty v. Smith*, 1 Bing. N. C. 649, and see *Chambers v. Barnard*, 9 Dowl. 557. And an alteration or interpolation in any other part of the affidavit, made after it is sworn, would have the same effect. *Wright v. Skinner*, 5 Dowl. 92. Where in the jurat of an affidavit, originally intended to be sworn before a judge, but afterwards sworn in court, the words "before me" had been struck out, and "by the court" inserted, Patteson, J. held that this was not an erasure within the meaning of the above rules, and was no

objection to the affidavit. *Austin v. Grange*, 1 Har. & W. 670. 4 Dowl. 576. So, striking out the jurat altogether, and writing a new one is not an erasure within the meaning of the above rule, and is very commonly adopted in practice. So, striking out words introduced by mistake, which form no necessary part of it, and may be separated without altering the sense, is not such an erasure. *Dawson v. Wills*, 10 Mees. & W. 662.

Also, where the deponent is a foreigner, not sufficiently acquainted with the English language, the affidavit must be interpreted to him by a sworn interpreter, and that fact must be stated in the jurat. See *Bose v. Sollier*, 4 B. & C. 358.

And lastly, in every affidavit sworn in court, or before any judge or commissioner thereof, and made by two or more deponents, the names of the several persons making the affidavit shall be written in the jurat. *R. G. M.* 37 G. 3. *Pardoe v. Terrett*, & *Lackington v. Atherton*, 12 Law J., 143, cp.

When to be sworn.] In the court of Queen's Bench, no affidavit can be used in support of a rule for a new trial, unless made before the expiration of the first four days of term, where the cause has been tried in vacation, or of the first four days after the return of the distringas, if the cause were tried in term, without the special permission of the court for that purpose. *R. T.* 5 G. 4. In all other cases, the affidavit may be made at any time before it is actually used. See *Ferring v. Kepner*, 4 Nev. & M. 477. *Wynne v. Wynne et al.* 9 Dowl. 396. Where it was objected to an affidavit, intended to be used in showing cause against a rule, that it was sworn after the day on which the rule was due, it was holden to be no valid objection. *Graham v. Beaumont*, 5 Dowl. 49. And on the other hand, where a motion was made on affidavit, for leave to sue out an execution notwithstanding a writ of error, it was holden to be no objection to the affidavit that it was sworn before the judgment was signed. *Baskett v. Barnard*, 4 M. & S. 331. But where an affidavit to obtain a *capias*, was sworn before the order was granted, but the jurat by mistake was not signed by the judge until after the arrest, the order and all proceedings thereon were set aside for irregularity with costs. *Bill v. Bannut*, 8 Mees. & W. 317. As to the time of swearing to affidavits of verification of pleas in abatement, see *ante*, vol. 1, p. 298.

Defects waived or remedied.] Where there is a defect in the affidavit on which a rule nisi has been obtained, that defect is not waived by the other party appearing upon the rule, and producing affidavits in answer. *Clothier v. Ess.*, 2 Dowl. 731. Also, not making the objection for two months, it seems, is no waiver of the defect. *Sharp v. Johnson*, 4 Dowl. 324.

And where an affidavit, requiring to be intituled, was not so, the court held that they could not receive or take notice of it, although the counsel on the other side did not wish to take the objection. *Owen v. Hurd*, 2 T. R. 644. But if a rule be discussed and decided, and no objection be made to the affidavits at that time, the court will not listen to any objection to them afterwards. *Langton v. Viney*, 1 Mees. & W. 479.

As to remedying defects in affidavits :—If those used in showing cause against a rule be defective, the court usually allow them to be amended and resworn. *Anderson v. Ell*, 3 Dougl. 73. But if those on which a rule nisi has been obtained be defective, it is by no means a matter of course to allow them to be amended. In some cases, however, the court have allowed even this. Upon an application to set aside proceedings on a bail bond, on payment of costs, the cause shown against it was a defect in the jurat of the affidavit on which the rule was obtained : but the court, upon application, allowed the affidavit to be amended and resworn, and enlarged the rule in the mean time, saying that if they discharged the rule, it would only be productive of useless expense. *Goodricke v. Turley*, 2 Cr. M. & R. 637. In this last case, an attempt was made to remedy the defect in the jurat, by producing another affidavit made since the rule was obtained, but which was precisely the same as the first, except that the jurat was correct ; the court, however, held that they could not receive this second affidavit. *Id.* So, where the jurat was imperfect, the commissioner not having subscribed his name to it, the court allowed it to be sent back to be signed, although the time for filing affidavits in the motion had then elapsed. *Exp. Hall*, 8 Law J., 211, qb. So, where a rule for a mandamus against justices was obtained upon an affidavit intituled "the King v. the Justices of," &c. *Patteson, J.* allowed the affidavits to be taken off the file and amended, on payment of costs, and allowing the defendants to make affidavits in reply. *R. v. J.J. of Warwickshire*, 5 Dougl. 382. But the court have refused to do this, in a motion for a criminal information, saying that although there were some precedents for it in civil cases, there were none in criminal. *R. v. Cockshaw*, 2 Nev. & M. 278.

Where a rule is discharged on the ground of a defect in the formal part of the affidavit on which it was moved, the court seldom discharge it with costs, if they can avoid it. *See Harris v. Matthews*, 4 Dougl. 608. Where an objection was made that the deponent in an affidavit had been convicted and sentenced to transportation, and which fact was stated upon affidavit : the court held that although it might be a good ground for applying for a rule to take the first affidavit off the file, yet as the last affidavit did not negative the deponent's having served the term of his transportation, it was not suf-

icient for the purposes intended. *Holmes v. Grant*, 1 *Gale*, 19; and see *Lee v. Gansell*, *Cowp.* 3.

SECTION II.

Rules.

1. *The motion and rule.*

Affidavit.] In preparing the affidavit, care must be taken that it be correctly intituled in the court, and in the cause if there be one; see *ante*, p. 272, 273; otherwise the rule will be discharged. And it will not be waived by the opposite party appearing to show cause against the rule, and producing affidavits in answer; but advantage may be taken of the defect in any stage of the argument. *Clothier v. Ess*, 2 *Dowl.* 731. *Barkham v. Lee*, *Id.* 779. It must be objected to at the time, however, and not after the rule has been substantially disposed of. *Angton v. Viney*, 1 *Mees. & W.* 479. Care should be taken so that the affidavit be correct in the jurat, and in all the other formal parts of it. See *ante*, p. 280, &c.

As to the body of the affidavit, care must be taken to state all the facts necessary to obtain the rule required, and to support it afterwards if it should be contested. See *ante*, p. 278. Where a motion was made to discharge a defendant out of custody, on the ground of irregularity in the proceedings, but the affidavit did not allege positively that the party had been arrested, the court discharged the rule, and refused time to bid that fact. *Green v. Rohan*, 4 *Dowl.* 659. So, where upon motion to set aside an interlocutory judgment for irregularity, the affidavit did not in express terms state that judgment had been signed, but merely that the defendant had been served with a rule to compute, it was holden insufficient. *Classey v. Brayton*, 6 *Mees. & W.* 17. The court will not even notice the fact of an application having previously been made to a judge at chambers on the same subject, unless it be substantiated by affidavit, although the judge be present and admit it. *Moren v. Tute*, 7 *Mees. & W.* 142. But where, upon a motion to set aside a judge's order, it was objected that the order was not annexed to the affidavit, or set out verbatim in it, but the substance only of it was stated, the court held that to be sufficient. *Shirley v. Jacobs*, 3 *Dowl.* 101. And where all mention of the order was omitted in the affidavit, but the rule appeared to be drawn up upon reading the order, the court held it to be sufficient. *Atwill v. Baker*, 5 *Dowl.* 462. Care however must be taken not to set out any matter which is unnecessary or impertinent. See *Lewis v. Woolrych*, 3 *Dowl.* 692. *Thompson v. Dicus*, 2 *Dowl.* 95, 93.

the master's *allocatur*, for an attachment against the sheriff for not returning a writ, or not bringing in the body; *R. T. 17 G. 3, K. B. Chaunt v. Smart*, 1 B. & P. 477; but where the *allocatur* is between attorney and client, *Spragg v. Willis*, 2 Dowl. 531. *Boomer v. Mellor*, *Id.* 533, and for attachments in other cases, the rule is a rule *nisi* only. So all rules to set aside proceedings, for irregularity or otherwise, are rules *nisi*. Where it is a rule *nisi*, it is usually drawn up to show cause in four days in a town cause, or six days in a country cause, or even a less time where the term will not allow of more. Where it was moved for so late in the term, that there was little probability of cause being shown against it during that term, and application was therefore made that it should be drawn up to show cause at chambers, the court refused it, saying it was very unusual to do so; *Fall v. Fall*, 2 Dowl. 88; and it is only in the case of an application by a prisoner that the court usually consent to do so.

The rule, if made in a cause, must in general call upon the party and not merely his attorney, to show cause; *Engler v. Twisden*, 8 Law J., 128, *cp.*; unless it be a matter of complaint against the attorney personally. And it must be drawn up, not only on reading the affidavits on which it is moved, but also all other documents which it may be necessary to bring under the consideration of the court for the purposes of the rule, otherwise the court will discharge it. For instance, a rule *nisi* to strike out one of the counts of a declaration, must be drawn up upon reading the declaration; *Roy v. Bristowe*, 2 Mees. & W. 241; and the like: otherwise the court will discharge it.

Where a rule *nisi* is obtained, to set aside an annuity, the several objections intended to be insisted upon in showing cause, must be stated in the rule; *R. T. 42 G. 3, K. B.*; *M. 10 G. 4, C. P.*; and the same, where a rule *nisi* is obtained to set aside an award. *R. E. 2 G. 4, K. B.*; *M. 10 G. 4, r. 3, C. P. 11 Price*, 57.

Where a rule is drawn up with a stay of proceedings, if the opposite party take any proceeding whatever in the cause,—if he even move to enlarge another rule in the cause, *Wyatt v. Pribble*, 5 Dowl. 268,—it will be a violation of the rule.

In ordinary cases, the rule is dated on the day on which it is granted. And by R. G. H. 1 Vict. "every rule of court, delivered out in vacation, shall be dated the day of the month and week on which the same is delivered out, but shall be intitled as of the term immediately preceding such vacation." Where an application however was made to Littledale, J. in the bail court, and he took a few days to consider of it before he granted it, he held that the rule should be dated on the day on which it was applied for, and not on the day on which the application was granted. *Egan v. Rowley*, 8 Dowl. 145.

Service of it.] Personal service of a rule is required, where disobeying the rule will be a contempt of the court, punishable by attachment, *see post*, p. 305, or where the rule is a rule nisi, for an attachment. *Post*, p. 308, *Stunell v. Tower*, 2 Dowl. 673. *See Bottomley v. Bellchamber*, 4 Dowl. 26. The only exceptions to this are, rules upon the sheriff to return a writ, or bring in the body, &c., which may be served upon the under-sheriff, or upon any of his clerks at his office. *See vol. 1, p. 30, 37.* In all these cases, the rule itself must be shown to be served upon him. *Post*, p. 305, 306.

In all other cases, the rule may be served upon the party's attorney, or the attorney's agent, (*see ante*, vol. 1, p. 55, 68), either personally or by leaving it for him with his clerk at his chambers or place of business. But merely leaving it with a maid there, *Kent v. Jones*, 3 Dowl. 210. *Smith v. Spurr*, 2 Dowl. 231, or female servant, *Alanson v. Walker*, 3 Dowl. 258, unless the affidavit state her to be the servant of the party, and unless at the time of service she say that she is authorised to take in papers for her master; or putting it under the door, *Strutton v. Hawkes*, 3 Dowl. 25, or into the letter box, unless you afterwards call and ascertain that it has been received: will not be sufficient.

Where the party has not appeared, or where he sues or defends in person, and personal service is not required, service of a copy of the rule at his place of business or dwelling house, upon his clerk, or some person who may be presumed to have authority from him to receive it, will be sufficient. Leaving it with his mother, *Warren v. Smith*, 2 Dowl. 216, or wife, &c., or with a female, who is sworn to be a member of his family, though the degree of relationship be not known, *Weedon v. Lipman*, 9 Dowl. 111, or leaving it even with his female servant, *Thomas v. Ld. Ranelagh*, 5 Dowl. 258, at his place of residence, particularly if she say that she has authority to take in papers for her master: *see Edwards v. Napier*, 9 Dowl. 177, will be sufficient; but leaving it merely with "a workman on the premises of the defendant," *Hitchcock v. Smith*, 5 Dowl. 248, or with his warehouseman at his warehouse and place of business, *Ibotson v. Phelps*, 6 Mees. & W. 626, or with the landlady at his lodgings, *Gardner v. Green*, 3 Dowl. 343, or with a person by name, stating that he promised to deliver it to the party, *Taylor v. Whitworth*, 9 Mees. & W. 478, or with the shopman of the person in whose house he resides, *James v. Westdale*, 9 Dowl. 104, have been deemed insufficient, where it was not afterwards ascertained that the rule had come to the party's hands. So leaving it at his chambers, &c., when there was no person there to receive it, is insufficient, *Chaffers v. Glover*, 5 Dowl. 81, unless there be a notice there desiring that papers may be so left. *Warren v. Thompson*, 2 Dowl. N. C.

224. So, leaving it for him at his house or place of business which is shut up, and no person there to receive it, *Castle v. Sourby*, 4 Dowl. 669, or at a house or place of business which the party has left, *Black v. Cloup*, 5 Dowl. 270. *Mudie v. Newman*, 2 Dowl. 639, without ascertaining afterwards whether he has received it, see *Englehart v. Morgan*, 1 Dowl. 422, will not be sufficient; in such a case, you should make every possible endeavour to serve it, and upon stating those endeavours in an affidavit, and that you do not know where the party is to be found: the court upon application will grant a rule that service at the party's last place of residence, &c., and sticking up a copy of the rule in the office, may be deemed good service, and will enlarge the original rule in the mean time. *Probin v. Locock*, 1 Dowl. N. C. 197. See *Sealy v. Robertson*, 2 Dowl. 568. *Martin v. Colvill*, *Id.* 694. *Davies v. Jenner*, 9 Dowl. 45. *Wright v. Gardiner*, 3 Dowl. 657. *Brown v. Stillie*, 1 Har. & W. 672. And see *Grewer v. Fitton*, 8 Dowl. 29. This service, however, will not be good, unless the leave of the court have been previously obtained. *Neilson v. Shee*, 8 Dowl. 32. But although the party himself may have left the house, yet if his family be still residing there, a service there will be good. *Payett v. Hill*, 2 Dowl. 688. So, where the party had been personally served with the writ at his lodgings, a service of a rule to compute upon the daughter of his landlady there, was holden by Patteson, J. to be sufficient. *Lawes v. Scales*, 2 Dowl. N. C. 342. So, where the party was a member of a certain club, and had accepted a bill payable at the club house, Taunton, J. in an action on the bill, granted a rule to show cause why service of the rule to compute upon the porter at the club house, who had stated that the defendant sent his servant every day to receive messages or letters left there for him, should not be deemed good service; and the rule was afterwards made absolute, and served in the same manner. *Ridgway v. Baynton*, 2 Dowl. 183. So, where the rule and a copy were sent in a letter by post directed to the party, and the rule was returned indorsed, "received a copy of the within rule," in the party's handwriting, this was holden to be sufficient. *Smith v. Campbell et al.* 6 Dowl. 728.

In an action upon a promissory note against several defendants, who suffered judgment by default, it was holden that service of a rule *nisi* to compute upon one of them, was sufficient; for by suffering judgment by default, they admitted a joint cause of action, and that *quoad hoc* they were partners. *Figgins v. Ward et al.*, 2 Dowl. 364. *Carter v. Southall*, 3 Mees. & W. 128. *Amlot v. Evans et al.*, 7 Mees. & W. 462. *Arnold v. Evans*, 9 Dowl. 219.

If there be any irregularity in the service, the party's appearing and showing cause against the rule will in general be a waiver of it; *Noel v. Eyre*, 4 Tidd, Pr. 506, but see *Stimell v. Tower*, 2 Dowl. 673; even moving to enlarge the rule, will

have the same effect. *Cartwright v. Blackworth*, 1 Dowl. 489. But by the party thus appearing, he does not waive an irregularity in the rule itself or in the copy served,—as for instance, that it is not intitled in the cause, or the like. *Wood v. Critchfield*, 1 Cr. & M. 72.

In all cases where personal service is not required, or where it is not intended to bring the party into contempt, it is not necessary to show the original rule to the person with whom the copy is left. *Bellairs v. Poulitney*, 6 M. & S. 230. *Holmes v. Senior*, 7 Bing. 162. By R. G. H. 2 W. 4, s. 51, "it shall not be necessary to the regular service of a rule, that the original rule should be shown, unless sight thereof be demanded, except in cases of attachment."

The rule must be served a reasonable time before the day specified in it for showing cause; where a rule *nisi* to compute, was served at York on the day cause was to be shown, Gurney, B. held it insufficient to authorise making the rule absolute, even although ten days had elapsed since the service. *Fairrell v. Dale*, 2 Dowl. 15. And if it is to be served upon an attorney, it must be served before nine o'clock at night. R. G. H. 2 W. 4, s. 50. See ante, p. 68. If served so late in the term that the party cannot show cause against it during that term, the court upon application will enlarge it. It may be necessary to mention, that a party who has obtained a rule *nisi*, is not bound to serve it; nor has the other party any power to compel him to proceed with it. *Doe d. Harcourt v. Roe*, 4 Taunt. 883. And even after serving it, he may abandon it, and give the other party notice not to appear to show cause against it, offering at the same time to pay him any costs he may have incurred.

Having served the rule, make an affidavit thereof stating the time and manner of service. The rule should be annexed to the affidavit before it is sworn, and the affidavit must be of a service of a "copy of a rule hereunto annexed;" swearing to a service of "the rule in this cause," would be bad. *Fidlett v. Bolton*, 4 Dowl. 282. Where the affidavit stated a service of "a true"—omitting the word "copy," *Littledale, J.* held it to be sufficient. *R. v. Sh. of Stafford*, 5 Dowl. 238. And where it stated a service of the original rule itself, and not a copy, it was holden sufficient. *Leaf v. Jones*, 3 Dowl. 315. Care should be taken that the affidavit be correct in its title, see *Anderson v. Baker*. 3 Dowl. 107, and the other formal parts of it.

2. Cause shown, &c.

All persons called upon by a rule *nisi*, must show cause against it, otherwise it will be made absolute against them. But no other person has a right to show cause against it, even

although he may have been served with a copy of the rule; *Johnson v. Marriat*, 2 Dowl. 343; nor will the court give him costs, although no case be made out against him. *Id.* When a rule *nisi* is obtained for setting aside proceedings for irregularity, however, the opposite party, instead of showing cause, may offer to relinquish the irregular proceeding and pay the costs; after which the party who obtained the rule cannot make it absolute. But the opposite party must, in such a case, offer all that the other party would be entitled to by making his rule absolute. *Clarke v. Crockford*, 3 Dowl. 693.

When.] The rule specifies on what day cause is to be shown against it. But by R. G. E. 2 W. 4, the days between Thursday next before, and the Wednesday next after Easter-day, shall not be reckoned or included in any rules. This however is a matter of observance for the clerk who draws up the rule. Cause is seldom shown on the day mentioned in the rule; but it may on the next, or on any other day during the same term, (*See Smith v. Collier*, 3 Dowl. 100) that may be convenient to the counsel on both sides. In the Exchequer, however, if rules be granted in one term, to show cause on any day certain in the next, cause must be shown on the very day for which the rules are drawn up. *Wurner v. Wood*, 3 Dowl. 262. On the last day of term, the court will not allow cause to be shown against a rule for setting aside an award; *ante*, p. 260, *Bignall v. Gale*, 2 Man. & Gr. 364; and the rule, in such a case, must consequently be enlarged until the next term. Nor will the court usually hear a rule argued on the last day of term, in which any nice matter of law is to be discussed, but they in general order it to be enlarged until the term following.

But if the party against whom a rule is to be applied for, be apprized of it in time, he may, if the court will allow him, show cause against the rule in the first instance, that is to say, immediately after its being moved for; *Quin v. King*, 4 Dowl. 736; in which case the counsel, who moves the rule, is entitled to a reply. *Anon.* 4 Taunt. 690.

Affidavit.] It seems that it is only in cases where the rule *nisi* has been obtained upon affidavit, that an affidavit may be used in showing cause against it. *Atkins v. Meredith*, 4 Dowl. 658. And therefore where a rule *nisi* for a new trial was moved for on the judge's report alone without affidavit, the court refused to allow the other party to use an affidavit in showing cause. *Doe v. Baytup*, 1 Har. & W. 270. It may be sworn at any time before cause is actually shown against the rule. *Braine v. Hunt*, 2 Dowl. 391. *Graham v. Beaumont*, 5 Dowl. 49. And the party showing cause, may in fact make use of any affidavits on the files of the court, in the same cause, *Ryan v. Smith*, 9 Mees. & W. 223, whether filed by the party

showing cause or his opponent; *Price v. Hayman*, 4 *Mees. & W.* 8. *Chambers v. Bryant*, 12 *Law J.* 139, *qb.*; but it is usual in such a case, to give notice to the opposite party of your intention to do so.

In the court of Queen's Bench, where a rule is enlarged from one term to another, the rule by which it is enlarged always requires that the affidavits, to be used in showing cause, shall be filed one week before the term. And by R. M. 36 G. 3, in all cases where a special time is limited in any rule, before which any affidavit is required to be filed, no affidavit filed after the time, shall be used in court or before the master, unless it appear to the satisfaction of the court that the filing of it within the time limited was prevented by inevitable accident. And the same is the practice in the Common Pleas; except that the affidavits to be filed before Trinity Term, may be filed four days before the term, instead of a week. See *Harding v. Austen*, 8 *Moore*, 523. This rule formerly was not very strictly enforced; see *Hoar v. Hill*, 1 *Chit.* 27; but the courts now hold parties to a strict observance of it. *Gilson v. Carr*, 4 *Dowl.* 618. *Turner v. Unwin*, *Id.* 16, 1 *Har. & W.* 186. *Cosby v. Betts*, 1 *Dowl. N. C.* 503. *Wright v. Lewis*, 8 *Dowl.* 298. And when thus filed, the opposite party may use and observe upon them, whether the party filing them intends to make use of them or not. *Price v. Hayman*, 4 *Mees. & W.* 8.

Cause shown, how, &c.] The first thing to be done is to get an office copy of the affidavit and rule on which the rule was moved; for until this has been obtained, counsel cannot be heard. *Brown v. Probert*, 1 *Dowl.* 629. But when the affidavits, intended to be used on showing cause, are filed, as above mentioned, it is not necessary for the other party to obtain office copies of them, before he is heard in support of his rule. *Pitt v. Coombs*, 4 *Nev. & M.* 535, 1 *Har. & W.* 13.

In showing cause, and indeed in supporting the rule also, the counsel will be obliged to confine themselves strictly to the facts stated in the affidavits. See *Aliven v. Furnival*, 2 *Dowl.* 49.

No affidavits can be read in reply to those used in showing cause against the rule. *Shaw v. Mansfield*, 7 *Price*, 709. See *Bury v. Clench*, 1 *Dowl. N. C.* 848.

It may be necessary to mention, that a party called upon to show cause against a rule, may oppose the rule in person, or by a new attorney, without notice to the other party of any order to change his former attorney. *Lovegrove v. Dymond*, 4 *Taunt.* 669.

In deciding the case, the court cannot make any order upon a person, who is not a party to the rule, not even upon the attorney of either of the parties, however reprehensible his conduct may have been. *Cheslyn v. Pearce*, 4 *Dowl.* 693. *Norton v. Curtis*, 3 *Dowl.* 245.

Where the rule is supported and opposed by long and contradictory affidavits, or involves any complicated question of fact, the court generally refer the matter to the master, who will thereupon consider the affidavits, hear the parties, receive fresh affidavits, if he think them necessary, *Noy v. Reynolds*, 4 Nev. & M. 483, 1 Har. & W. 14, and report to the court; but he cannot hear testimony *viva voce*, unless authorised to do so by the terms of the reference, or by a judge's order. *Id.*

When the rule is disposed of, the rule by which it is made absolute or discharged must in all cases be drawn up, and in strictness ought to be served. The general rule is that the successful party shall procure it to be drawn up and served. But there are some cases, where the rule is made absolute or discharged upon terms, in which the rule is the rule of both parties—of the party who has succeeded, that he may have the benefit of the rule, and of the other party, that he may enforce the terms on which the rule has been made absolute or discharged, and either party may draw it up. And it is a general rule that all rules which require a thing to be done at a certain time, must be drawn up before that time, otherwise it is considered to be abandoned. Therefore where a rule *nisi* for judgment as in case of a nonsuit, was discharged on a peremptory undertaking to try at a particular time, and the rule was not drawn up before that time, the court held that it could not afterwards be enforced; it was abandoned, and no peremptory undertaking therefore existed. *Gingell v. Bean*, 1 Mem. & Gr. 50. *Sawyer v. Thompson et al.* 9 Mees. & W. 248.

As to the time limited for taking the next proceeding, after the rule is determined, where the rule *nisi* has been a stay of proceedings, *see post*, p. 321, 322. After the rule has been once decided, the court, we have seen, (*ante*, p. 287) will not entertain a second application upon the same subject, even upon a different statement of facts, *Rosset v. Hartley*, 1 Har. & W. 581, unless the former rule were discharged on account of a mere informality in the affidavits. In the court of Queen's Bench, in like manner, if a rule be decided by the judge in the Bail court, it cannot be again moved in full court, *Rosset v. Hartley*, *supra*, at least not without the permission of the judge who decided it; and even with his permission, not in another term. *Todd v. Jeffery*, B. R. M. 1837, MS.

It may be necessary to add, that by appearing to show cause against a rule, a party does not waive any objection to the affidavits of his opponent, or the copy of the rule served; *Wood v. Critchfield*, 1 Cr. & M. 72; but he thereby waives all objection to the affidavit of service, or to any irregularity in the service itself.

Costs.] Where cause is shown against a rule in the first in-

ance, the court never give costs to the party showing cause, though he be successful. *Read v. Speer*, 5 Dowl. 330, *Fitch v. Green*, 2 Dowl. 439.

If a rule *nisi* be moved with costs, if the court make it absolute, it must depend upon the circumstances of the case, whether they will make it absolute with costs, or not. If they discharge it, they usually do so with costs. But if in discharging it, after argument, nothing be said by the court as to costs in the Queen's Bench, it must be understood that the court make no order as to costs; *See Drinkerv. Pascoe*, 4 Dowl. 66; in the Common Pleas, however, it is deemed to be discharged with costs, unless the court otherwise order. And ever in the court of Queen's Bench, if a rule *nisi* for setting aside proceedings for irregularity be discharged generally, without mention of costs, the rule must be deemed to be discharged with costs. *R. M.* 37 G. 3, *K. B.* *See post*, p. 322. In the case of irregularity, the court usually give costs to the successful party, *see post*, p. 322. *Minns v. Baxter*, 1 T. R. 16. *Huggett v. Markin*, 1 Bing. 65, unless perhaps where the point is a new and doubtful one, *see* 2 T. R. 1, 3 T. R. 642, or where the party has been misled by a previous case which was wrongly decided. *Islade v. Davidson*, 4 T. R. 610, and *see Bell v. Jackson*, 1 T. R. 663.

If the rule *nisi* be not moved with costs, the court will seldom grant costs if it be made absolute; and they cannot grant costs, if no cause be shown against it; whether they will grant costs, or not, upon discharging it, will depend upon the circumstances of the case. *See Re Morrison*, 8 Dowl. 94. If they say nothing as to costs, it must be considered that costs are not granted; *Anon.* 1 Chit. 398; and no substantive application can afterwards be made for them. *Holmes v. Edwards*, 6 Dowl. 51.

If the party applying, succeed in obtaining part only of what he sought by his rule *nisi*, the court will not give him costs. *Aliven v. Furnival*, 2 Dowl. 49. *Mc Andrew v. Adam*, 1 Bing. 270, 3 Dowl. 120. If the other party indeed were to give notice that he would oppose the rule only upon those points on which he afterwards succeeds, and the applicant still persist in claiming the whole, the court it seems would give the former his costs. *Id.*

If a rule be discharged for a defect in the affidavit on which it is moved, it is usually without costs. *Preedy v. Lovell*, 4 Dowl. 671.

Where a party obtains a rule *nisi*, in a matter which ought only to be made the subject of an application to a judge at chambers, if he succeed in making his rule absolute, the court will not give him costs, or will only give him such costs as a judge at chambers would have given him. *Vaughan v. Trewent*, 2 Dowl. 299.

No costs can be given against a person who is not a party

to the rule; to make him pay costs, a special application must be made for the purpose. *Norton v. Curtis*, 3 Dowl. 245. *Cheslyn v. Pearce*, 4 Dowl. 693.

If the rule *nisi* be moved for on payment of costs, and be made absolute, but be afterwards abandoned by the party obtaining it, there is no mode of obtaining these costs; the rule in such a case is conditional merely, and it is optional with the party whether he will abide by it or not. *Pugh v. Kerr*, 5 Mees. & W. 164.

• *Enlargement; opening, rescinding, &c. of rules.*

Enlarging rules.] The court, upon sufficient grounds shown, will enlarge a rule to another day in the same term, or until the following term. It is seldom requisite to apply to enlarge a rule to another day in the same term, as counsel usually consent to a case standing over, where they think that the court upon application would grant a like indulgence. But where a rule *nisi* is served so late in the term, or where from other circumstances, it is impossible to show cause against it in the same term, the court will enlarge it to the term following.

Formerly, in the Queen's Bench, the rules enlarged to the next term were set down in a peremptory paper, for particular days, and called on in their order in the following term; *R. H. 6 G. 3*; *H. 15 G. 3*; *M. 17 G. 3*; *H. 36 G. 3*; and they could not afterwards be put off from the appointed day, without the leave of the court. *R. E. 41 G. 3*. And such is at present the practice in the court of Exchequer, except that the peremptory paper is called on, before motions, on the second day in each term, and if counsel do not then attend to support or oppose the rules, the court will strike them out. *R. M. Ex. 2 Vict.* But in the court of Common Pleas, there is no peremptory paper; but rules enlarged to a particular day in the same or another term, are brought on as other rules, and may be made absolute at any time on the day to which they stand enlarged, *Shaw v. Masters*, 2 Taunt. 174, or afterwards. And at present, in the court of Queen's Bench, by *R. M. 4 Vict.*, the above rules relating to the peremptory paper are rescinded, and it is ordered that in future all enlarged rules shall be drawn up for the first and other days in the next term, in the order in which they shall have been enlarged, and in such number for each day as the master may see fit; and either party may bring on such enlarged rules, and the court will dispose of them in the same manner as if brought on in the term in which they were moved for. But no rule can be made absolute, or opposed, in another term than that for which it is drawn up, unless it have been enlarged.

Formerly, in the court of Common Pleas, where a rule was

enlarged, notice thereof was required to be given to the opposite party. But now by R. G. H. 2 W. 4, s. 97, "a rule may be enlarged, if the court think fit, without notice."

Opening rules.] If from mistake or accident or the like, a rule be made absolute, without opposition, where it was intended to show cause against it, or where it is discharged in the absence of the counsel instructed to support it, the court will in general open it, in order that it may be discussed upon the merits. But once a rule has been discussed and decided upon the merits, the court will seldom allow it to be opened, even upon a different statement of facts. See *ante*, p. 287, 294, and see *Phillips v. Weyman*, 2 Chit. 265. *Fussell v. Silcox*, 5 Taunt. 628. So the court have refused to open a rule, upon a suggestion that the report of the master, upon which the court had acted in disposing of the rule, was erroneous. *Gingell v. Bean*, 1 Man. & Gr. 555. And a rule made in the Bail court, is not more liable to be re-opened, than one made in full court. *Todd v. Jeffery*, 7 Ad. & El. 519.

Rescinding rules.] The court will seldom rescind a rule which they have made after hearing both parties, see *Dillamore v. Capon*, 1 Bing. 398. *Davis v. Cottle*, 3 T. R. 405, and never in the next term. *Todd v. Jeffery*, B. R. M. 1837, MS. But where rules are obtained *ex parte*, absolute in the first instance, the party against whom they were obtained may move to discharge them, if he can show that they ought not to have been granted; and the court thereupon grant a rule *nisi*, which is afterwards made absolute or discharged, as in ordinary cases.

SECTION III.

Judge's order.

In what cases.] Nearly all matters of practice may be brought before a judge at chambers for his decision. He may, in his discretion, set aside a judgment in ejectment, and a writ of possession executed, on the application of the tenant, and let him in to defend; *Doe d. Malarchy v. Roe*, 9 Law J. 53, *qb.*; and the like. He may now also entertain applications by sheriffs for interpleader; 1 & 2 Vict. c. 45, s. 2; although formerly this was otherwise unless with the parties' consent. In term time, however, the judges do not hear arguments by counsel, and therefore do not entertain applications which require the attendance of counsel. And by stat. 11 G. 4 & 1 W. 4, c. 70, s. 4, every judge of the courts of Queen's Bench, Common Pleas and Exchequer, to whatever court he may belong, is authorised to transact such business at chambers or elsewhere,

depending in any of the said courts, as relates to matters over which the said courts have a common jurisdiction, and as may, according to the course and practice of the court, be transacted by a single judge. See *Drifill v. Taylor*, 4 Bing. N. C. 369. Also by a former statute, 1 G. 4, c. 55, s. 5, the judges on their circuits, respectively, are authorised to grant summonses and make orders, in all actions and prosecutions, which, if brought to trial, would be tried upon their circuit, whether they be judges of the courts respectively in which the records in such actions or prosecutions were made up, or not. See *Ashworth v. Heathcote*, 6 Bing. 596. Also, if a statute, in any new proceeding, give jurisdiction to a judge at chambers, he alone has original jurisdiction in the matter, the court have not; but after he has fully decided it, and made his order, the court may review it, and rescind or confirm it. *Brown v. Bamford*, 9 Mees. & W. 42. See *Johnstone v. Knotoles*, 1 Dougl. N. C. 30.

Summons.] All matters for the decision of a judge at chambers, are brought before him by summons, which may be obtained upon application to the clerk at the chambers of any of the judges. A copy of this summons must be served on the attorney or agent of the opposite party; who will thereupon either indorse a consent to an order on the back of the summons, or attend before the judge. If he indorse a consent, the judge's clerk upon application will draw up an order accordingly; but it must be observed that the consent of itself binds neither party, unless the order be actually drawn up and served. *Joddrel v. —*, 4 Taunt. 253. If both attorneys attend before the judge, the matter is then discussed, and the judge makes or refuses an order. But if the opposite attorney do not attend in pursuance of the summons, the attorney who obtained it must wait half an hour (*R. T. 35 G. 3, K. B.*), and may then obtain a second summons to the same effect for the next day, and serve it. Formerly three summonses were in general necessary, before the judge would make an order upon default of the opposite attorney. But now by *R. G. T. 1 W. 4, s. 9*, "it shall not be necessary to issue more than two summonses for attendance before a judge upon the same matter; and the party taking out such summonses shall be entitled to an order on the return of the second summons, unless cause is shown to the contrary." If therefore the opposite attorney do not attend the second summons, the judge's clerk will draw up the order, upon an affidavit of service of the two summonses, of the attendances thereon, and of the opposite attorney's non-attendance. There are some cases, however, in which the order is made upon the first summons, the summons being served two days before it is attendable; such as an order to deliver or to tax an attorney's bill. *R. G. H. 2 W. 4, s. 91.* And

there are other cases, in which the judge, under particular circumstances, will grant a peremptory summons in the first instance, attendable on the next day, and in default of attendance an order will be made upon it. But where, in an ordinary summons, the attorney's clerk inserted the word "peremptory" without authority, the court, upon an application to them upon the same subject, ordered the attorney to pay the costs. *Finnerty v. Smith*, 1 *Hodg.* 158. There are also some applications to a judge at chambers, which are *ex parte*, and without summons: such as an application for an order for a *copias*, and the like. But where a judge at chambers, upon an *ex parte* application of a party to an arbitration, made an order under stat. 3 & 4 W. 4, c. 42, s. 39, allowing him to revoke his submission, the court rescinded the order, holding that the judge had no authority to make it, without giving an opportunity to the other parties to be heard against it. *Clarke v. Stocken*, 2 *Bing. N. C.* 651.

A summons, if served, is a stay of proceedings from the time it is attendable, *Anthill v. Medcalfe*, 2 *New Rep.* 169. *Redford v. Edie*, 6 *Taunt.* 240. *Trego v. Tatham*, 2 *Man. & Gr.* 509, and if followed up by a second summons, will continue to stay the proceedings until it be disposed of. See *Knowles v. Vallance*, 1 *Gale*, 16. *Hodgson v. Caley*, 8 *Dowl.* 318. Where the time for pleading expired on the 7th, and on that day a summons for leave to plead several matters was served, attendable on the 8th at 11 o'clock, being the hour at which the judgment office opened; and the plaintiff's attorney instead of attending the summons signed judgment as for want of a plea: the court set aside the judgment for irregularity with costs, holding that from 11 o'clock the summons operated as a stay of proceedings. *Wells v. Secret*, 2 *Dowl.* 447. *Morris v. Hunt*, 2 *B. & A.* 355. Even where a summons, in term time, was made attendable at ten o'clock in the morning before a judge of the King's Bench, a time when a judge of that court, as was well known, never attended at chambers: still it was holden, to be a stay of proceedings from 10 o'clock. *Byles v. Walter*, 5 *Dowl.* 232; but see *Bebb v. Wales*, *Id.* 458, *semb. cont.* Where however a summons was taken out to tax an attorney's bill, but the usual undertaking to pay was not entered in the book at the judge's chambers or embodied in the summons: the court held that it did not preclude the attorney from commencing an action for the amount, by suing out a writ, and which he was obliged to do in order to save the statute of limitations. *Williams v. Roberts*, 3 *Dowl.* 512. So, where a summons was taken out in vacation, to set aside a writ of execution for a variance in the amount from the sum entered in the master's book in signing judgment, and in the interval between the first summons being attendable, and the attendance on the second summons, the plaintiff entered upon the

roll a judgment according with the writ of execution : the court held that he might do so ; the summons was taken out for a collateral purpose, and not in the cause, and was therefore no stay of proceedings. *Phillips v. Birch*, 2 Dowl. N. C. 97. So where several successive summonses were taken out, but no order obtained on any of them, they were holden not to be a stay of proceedings. *Bass v. Cooper et al.* 2 Mees. & W. 310. If the order be refused, the party who obtained it has not the same time allowed him to take the next step, that he had when he served the summons ; but if the time limited for his taking the next step have expired, he is allowed for that purpose the whole of the day on which his summons has been disposed of. *Hughes v. Walden*, 5 B. & C. 770. *Glover v. Watmore*, *Id.* 769, and see post, p. 321, 322.

Affidavit.] If it be intended to use affidavits before the judge, they must be intituled, and be regular in every other respect, as in an application to the court. See ante, p. 272, &c. If they are intended to be used upon the hearing, it is usual to give the opposite party a copy of them, in order that he may be prepared with answers to them. If the affidavit be used, it is filed with the judge's clerk, who on the last day of each term delivers all the affidavits thus in his custody to the Rule Office. See *Needham v. Bristow*, 1 Dowl. N. C. 700. See *R. G. H. 1 Vict.*

Order.] If the order is made upon default of the opposite attorney, as mentioned ante, p. 298, the judge's clerk will draw it up in the terms of the summons ; if made by consent, he will draw it up in the terms of the consent as indorsed. But if the parties attend before the judge, the judge after hearing them, if he think fit to make an order, makes a minute of it on the back of the summons, and gives it to the successful party, who then takes it to the judge's clerk, and has the order drawn up accordingly. If the party, however, do not like the order which has been made, it is optional with him to have it drawn up or not ; *Daley v. Arnold*, 1 Dowl. N. C. 938 ; if he do not, the opposite party has no mode of compelling him, but he may proceed to obtain a similar order in the ordinary way, if he will. *Macdougall v. Nicholls*, 5 Nev. & M. 366, 1 Har. & W. 462. Sometimes an order nisi is granted ; and this becomes absolute as of course, on the day therein mentioned, unless cause be shown against it. *Humphreys v. Jones*, 6 Mees. & W. 418. In such a case, if the party who obtained the order do not attend at the judge's chambers on the day, the best way is to go in before the judge, say that you are ready to show cause against the order, and apply to have it discharged. *Per Parke, B. Id.* It was at one time doubted whether judges at chambers had a power to award costs ; *Read*

v. Lee, 2 B. & Ad. 415. *Spicer v. Todd*, 2 Crompt. & J. 165 ; but it is now fully settled that they have, *Doe d. Prescott v. Roe*, 1 Dougl. 274. *Re Bridge & Wright*, 4 Nev. & M. 5. *Hughes v. Brand*, 2 Dougl. 131. *Collins v. Aaron*, 4 Bing. N. C. 233. *Sykes v. McClise*, 8 Dougl. 145. *Clement v. Weaver*, 3 Man. & Gr. 551, although they seldom exercise it, except in cases of irregularity. A judge at chambers, however, has no authority to order payment of debt and costs by instalments, without the plaintiff's consent. *Kirby v. Ellison*, 2 Dougl. 219. If an order be made on payment of costs, this does not imply an undertaking to pay them, nor can payment of them be enforced. *Fricker v. Eastman*, 11 East, 319.

Care must be taken to serve the order ; for until service it is of no effect. See *Wilson v. Hunt*, 1 Chit. 647. And it should be drawn up and served forthwith, for delay in doing so will be deemed a waiver of it. *Charge v. Farkall*, 4 B. & C. 865. *Kenney v. Hutchinson*, 6 Mees. & W. 134.

The only mode of reviewing the decision of a judge at chambers, in granting or refusing an order, is by application to the court in which the action or other proceeding is pending : if the judge have granted an order, the application may be to rescind it : the court cannot receive it in any other way ; *Turquand v. Hautrey et al.* 9 Mees. & W. 721. *Abbott v. Hopper*, 8 Dougl. 19 ; if he have refused it, the application may be for a rule to the like effect as the order refused. In general a judge's order may be rescinded by the court, even in cases where original jurisdiction is alone given to a judge at chambers, and cannot be exercised by the court. *Brown v. Bamford*, 9 Mees. & W. 42. *Johnstone v. Knowles*, 1 Dougl. N. C. 30. But where a statute vests a discretionary power in a judge at chambers, the court will not interfere or rescind his order. And therefore where it was alleged that a judge had awarded a *distringas* on an insufficient affidavit, the court refused to set aside his order in this respect, because all the statute requires is that the court or a judge shall be satisfied from the affidavit that the defendant keeps out of the way in order to avoid being served with process. *Gale v. Winks*, 5 Dougl. 348. And where a judge at chambers made an order to exempt an executor from costs, under stat. 3 & 4 W. 4, c. 42. s. 31, and an application was made to the court of King's Bench to rescind that order : the court held that they had no authority to do so ; they said that the authority of a judge, under that statute, was co-ordinate with that of the whole court, and they could not therefore interfere. *Maddocks v. Phillips*, 5 Nev. & M. 370. but see *Lakin & Massie*, 4 Dougl. 239, *cont.* So, where a judge makes an order to amend the *postea* in a case tried before himself, the court will not set it aside, because they have no authority to make him produce his notes. *Sandford v. Alcock*, 12 Lav. J. 40, *ex.* The court also will not in general review the decision

of a judge, in merely granting or refusing costs. See *Davey v. Brown*, 1 Bing. N. C. 460. *Giraud v. Austin*, 1 Dowl. N. C. 703. The application also must be made promptly, and before the other party has proceeded upon the order and incurred expense. *Thompson v. Carter*, 3 Dowl. 657. And see *Orton v. Frunce*, 1 Har. & W. 672. *Clement v. Weaver*, 3 Man. & Gr. 551. *Wynne v. Wynne*, 9 Dowl. 396. *Baden v. Flight*, 6 Dowl. 177. See *Cocker v. Tempest*, 7 Mees. & W. 502. Nor can a motion be made to rescind it, after it has been made a rule of court; the motion in such a case must be to set aside the rule. *Id.* It has been said that the affidavit in support of the application must bring exactly the same facts before the court that were brought before the single judge, and that the court would not receive an affidavit of any additional fact. *Alexander v. Porter*, 1 Dowl. N. C. 299. But this has been ruled otherwise by the court of Exchequer, who have holden that either party may use affidavits of additional facts. *Gibbons v. Spalding*, 12 Law J. 185, *ex. Pike v. Davis*, 6 Mees. & W. 546. See *Thomas v. Evans*, 9 Mees. & W. 829. If the affidavits which were used at chambers be intended to be used upon the motion, notice should be given to the judge's clerk to produce them, and he will thereupon hand them to the clerk of the rules; but if he have already returned them to the Rule Office, notice should be given to the clerk of the rules to have them in court. See *Needham v. Bristow*, 1 Dowl. N. C. 700. The affidavit also must either have the judge's order annexed to it, *Hoby v. Pritchard*, 5 Dowl. 300, or must set out the substance of it. *Shirley v. Jacobs*, 3 Dowl. 101. It may be necessary to add, that one judge cannot review the decision of another: and therefore if a judge upon summons refuse an order, it is deemed highly improper to proceed by summons before another judge for the same purpose; if the party be dissatisfied, he should apply to the court. *Wright v. Stevenson*, 5 Taunt. 850.

The only mode of enforcing a judge's order, is to make it a rule of court, then require the party to obey the rule, and if he neglect or refuse to do so, apply for an attachment, or (if it be for the payment of money) sue out a writ of execution upon the rule. Even where a judge at chambers made an order to discharge a party out of custody, on his undertaking not to bring an action, and he afterwards commenced an action, the court refused to set aside the proceedings in it, until the order should be made a rule of court. *Jameson v. Raper*, 3 Moore, 65. Formerly an order obtained in vacation, could not be made a rule of court until the following term. *R. v. Price et al.* 2 Cr. & M. 212. But now it may be made a rule of court in vacation, and the rule be dated on or after the day of the date of the order, and may be intitled as of the previous term, under R. G. H. 2 Vict. mentioned *ante*, p. 288. *Bad-*

man v. Pugh, 12 *Law J.* 126, *cp.* The motion to make the order rule of court, is a motion of course, and absolute in the first instance. *Wilson v. Northop*, 2 *Cr. M. & R.* 326.

SECTION IV.

Attachment.

In what cases.

Disobeying rules of court.] Disobeying a rule of court, is a contempt of that particular court, and will in general be punished by attachment. It forms, in practice, the principal class of cases, which are punishable in that manner. There is a difference in this respect between a judge's order and a rule of court; disobeying the latter is a contempt of the court; disobeying the former is not. *Baker v. Rye*, 1 *Dowl.* 689. See *Woollison v. Hodgson*, 3 *Dowl.* 178. *Re Turner*, 6 *Dowl.* 6. But the distinction is more of a formal than of a substantial nature; for the judge's order may be made a rule of court, at any time during the term, see *R. v. Price*, 2 *Dowl.* 233, or even in vacation, *Badman v. Pugh*, 12 *Law J.* 126, *cp.*, as a matter of course, and then a disobedience of the rule will be punished by attachment. There is one case only which is an exception to this, and it is made so by a particular rule of court: namely, where a judge's order to return the writ or bring in the body, is obtained and served in vacation, although it is necessary to make the order a rule of court before an attachment can issue for disobedience of it, 2 *W.* 4, c. 39, s. 15, yet it is not necessary to serve the rule; service of the order is sufficient. *R. G. M.* 3 *W.* 4, s. 13. *R. G. H.* 3 *W.* 4. As to the motion for the rule and attachment in such a case, see *Stainland v. Ogle*, 3 *Dowl.* 99. *Howell v. Bulteel*, *Id.* in *notis.* *Hinchliffe v. Jones*, 4 *Dowl.* 86. *Pilcher v. Woods*, 4 *Dowl.* 329. *Forster v. Kirkwall*, 4 *Dowl.* 370, and *ante*, vol. 1, p. 30, 32.

Where a rule requires a party to pay costs, then, as soon as the amount of the costs is ascertained, upon taxation, by the *allocatur* of the master written upon it, if the party refuse or neglect to pay them, when demanded, the court will award an attachment against him. But if the rule, instead of ordering the party to pay the costs, merely grant him an indulgence "upon payment of costs," the court will not grant an attachment for non-payment of such costs, even although the party availed himself of the indulgence granted to him, and had the full benefit of it. *Doe v. Haddon*, *Hulloek Costs*, 401. *Stokes v. Woodeson*, 7 *T. R.* 6. *Reese v. Fenn*, 2 *Dowl.* 182. *Turner v. Gill*, 3 *Dowl.* 30. See *King v. Clifton*, 5 *T. R.* 257. So where an order to tax costs was obtained upon the

usual undertaking to pay them, but the undertaking was not embodied in the order, nor was it made a rule of court: it was holden that the attorney was not entitled to an attachment, to enforce payment of the costs taxed; for although the order had been made a rule of court, yet as the rule upon the face of it contained no order to pay, the non-payment was no contempt of the court. *Ryalls v. Emerson*, 2 Dowl. 357. *Harrison v. Ward*, 3 Dowl. 541. *Price v. Philcox*, 7 Dowl. 559.

In like manner, if the rule require the party to do any thing else, if he refuse or neglect to do it, the court will award an attachment against him: as in the ordinary instances of an attachment against a sheriff, for not obeying the rule to return the writ, or bring in the body,—an attachment for not performing an award, where the submission has been by rule of court, or has been made a rule of court, *see ante*, p. 252,—an attachment for not paying costs in ejectment, under the consent rule, where the plaintiff has been nonsuit, and the like. Where a rule required a party to reinstate certain premises forthwith, and in four days after service of it an attachment was moved for, on the ground of his not having obeyed it; to this it was answered, that it would take three weeks to reinstate the premises: but the court held that this was no reason why the party should not have begun promptly to do so, and they made the rule absolute. *Doddington v. Hudson*, 1 Bing. 410. And on the other hand, where a judge's order, made a rule of court, required an attorney to render an account, and he did so; and because the account omitted certain items, the other party moved for an attachment against him: the court refused it, saying, that as he had rendered the account, there was no ground for the application. *Exp. Lawrence*, 2 Dowl. 230. Where a party, who had entered into a rule to abide by an award, filed a bill in equity to set that award aside: the court granted an attachment against him; but they afterwards discharged him without fine, rather than set a small one for so high an offence. *R. v. Wheeler*, 3 Burr. 1256.

In other cases.] An attachment will lie for a libel on the court. *R. v. Middleton*, Post. 201. *R. v. Wyatt*, 8 Mod. 123. So, for very gross and contemptuous words of the court, at the time its process is served or executed upon the party, the court may grant an attachment; *Id.* 2 Hawk. c. 22, s. 36; but this is not usual. And where a defendant, after being served with process, collared and violently shook the officer, and ordered him to quit his presence: the court held that, without disclosing more of the circumstances, this did not necessarily amount to a contempt of the court, or an obstruction of its process, for which they would grant an attachment. *Adams v. Hughes*, 1 Brod. & B. 24. and see *Myers v. Wills*,

Moore, 147. *Weekes v. Whitely*, 3 Dowl. 536, 1 Har. & W.

So, altering a sheriff's warrant, is no ground for an attachment, unless an improper use be made of it. *Hale v. Lemon*, 1 W. Bl. 2. So, it is no ground for an attachment against a sheriff, that he returned to a *venditioni exponas*, that goods remained in his hands for want of buyers. *Leader Janvers*, 1 B. & P. 359. So, an attachment has been issued against an attorney for not performing his undertaking in his own client to pay him a debt and costs, due to him as a third party. *Ex p. Evans*, 9 Dowl. 106. But disobedience to a writ of subpoena, is punishable by attachment. See "*Witness*."

[*against peers*.] A peer is not liable to be attached for non-payment of money; *Ld. Falkland's case*, 1 Tidd, 194. *Walker v. Grosvenor*, 7 T. R. 171; nor is a member of the house of commons; *Catmur v. Knatchbull*, 7 T. R. 448; for the attachment in such a case is in the nature of civil process. In other cases, it seems, they are liable to an attachment. *Ex p. Bp. of St. Asaph*, 1 Wils. 332.

Proceedings for obtaining the writ.

[*service and demand*.] If it be intended to proceed by attachment against a party, for not obeying a rule of court, he must be served personally with the rule, that is to say, a copy of the rule and *allocatur*, (if there be one) must be served personally upon him, and the original at the same time shown him. *R. v. Smithies*, 3 T. R. 351. *Re —, Gent.* 1 D. & R. 36. *Parker v. Burgess*, 3 Nev. & M. 36. *Stunnell v. Tower*, 3 Dowl. 673. *Woollison v. Hodgson*, 3 Dowl. 178. *Albin v. Warner*, 3 Dowl. 563. 1 Har. & W. 215. *Dicas v. Warne*, 1 D. & R. 91. *Reid v. Deer*, 7 D. & R. 612. *Stunnell v. Tower*, 1 D. & R. 88. *Granger v. Fry*, 5 Dowl. 21. and see *Short v. Smith*, 1 Man. & Gr. 211. In some very strong cases, where it appeared clearly that the party knew of the rule, and kept out of the way to avoid being served with it, the courts have dispensed with personal service; see *Green v. Prosser*, 2 Dowl. 703. *Allier v. Newton*, 2 Dowl. 582. *Re Barwick*, 3 Dowl. 703. *Ex p. Dignam*, 4 Dowl. 359; but these cases have since been considered, and it has been determined that hereafter the rule must in all cases be strictly personal. *Per Patteson, J. in Kirk v. Holme*, 4 Dowl. 566. Where the party, however, admitted that the rule and *allocatur* were then in his possession, it was deemed equivalent to personal service, *Phillips v. Hutchinson*, 3 Dowl. 583. and see *Re Bower*, 1 B. & C. 264, and probably would be deemed so still. And where, upon the final rule being shown to a party, he prevents an actual personal service of the copy by violence, *Wenham v. Downs*,

1 *Har. & W.* 216, or by refusing to take it, *Rose v. Kepp*, 1 *Har. & W.* 213, 3 *Dowl.* 566. *Ellis v. Giles*, 5 *Dowl.* 255, or the like, it will be deemed equivalent to personal service. As to the original rule, if it be shown to the party, it will be sufficient; it is not necessary that it should be actually placed in his possession. *Goodman v. London*, 2 *Dowl.* 504. Or if the original itself be served, instead of a copy, it will be sufficient. *Leaf v. Jones*, 3 *Dowl.* 315. And where the attachment is for not obeying a judge's order, made a rule of court, it is sufficient to swear to a personal service of the rule, without swearing also to a service of the order. *Greenwood v. Dyer*, 5 *Dowl.* 255.

Also a demand of that which is ordered by the rule, must be personally made upon the party who is to perform it, otherwise an attachment will not be granted, *Doddington v. Hudson*, 8 *Moore*, 510, 1 *Bing.* 410. *Evans v. Millard*, 8 *Dowl.* 661, 1 *Gal.* 138, unless the party, by violence, &c. have prevented a personal demand from being made. *Wenham v. Downes*, 3 *Dowl.* 573. And if the demand is to be of any thing directed to be done by a judge's order, it cannot be made until after the order have been made a rule of court, *Chilton v. Ellis*, 2 *Cr. & M.* 459. So, where there is an order to tax an attorney's bill, and the usual undertaking given, if it be sought to enforce payment of the taxed costs by attachment, not only the judge's order, but also the undertaking, must be made a rule of court. *Price v. Philcox*, 7 *Dowl.* 559. The demand also must be made by the party to whom the money is to be paid, or other act done, *Ex p. Fortescue*, 2 *Dowl.* 448. *Doe v. Hickman* 1 *Man. & Gr.* 566, unless he have deputed some other person, by power of attorney, to make the demand for him. *Brown v. Jenks*, 4 *Dowl.* 581. And where money was to be paid to three persons, it was holden that a demand by one was not sufficient; if it were inconvenient for all to make the demand, they should have deputed some person to make it for them. *Sykes v. Haigh*, 4 *Dowl.* 114, 1 *Hodg.* 197. Where the demand is thus made under a power of attorney, the original power must be shown to the party, *Jackson v. Clarke*, 13 *Price*, 208, and a copy of it delivered to him. *Laugher v. Laugher*, 1 *Dowl.* 284. 1 *Tyr.* 352. *King v. Packwood*, 2 *Dowl.* 570. *Doe v. Johnson*, 7 *Dowl.* 550. But where the demand is of costs merely, it may be made, either by the party entitled to them, or by his attorney, whether by the terms of the rule such costs be made payable to the attorney or not; for he, in fact, is the person *primâ facie* entitled to them; *Cox v. Salmon*, 2 *Mees. & W.* 127. *Inman v. Hill et al.*, 4 *Id.* 7. *Mason v. Whitehouse*, 4 *Bing. N. C.* 692; but a demand by a person appointed by the attorney to receive them, will not be sufficient. *Clark v. Dignam*, 3 *Mees. & W.* 319. Where costs were by the rule made payable to the defendant or his attorney, a demand made by the

country attorney, although his agent in London was the attorney on the record, was holden sufficient. *Dennett v. Pass*, 1 Bing. N. C. 638, 3 Dowl. 632, 1 Hag. 157. Where they were made payable to the plaintiff or his agent, a demand by a third person, acting for the plaintiff, but not authorised by power of attorney, was holden insufficient; but Patteson, J. said, that if the plaintiff were an attorney, and the demand were made by his agent in London, it might be different. *Brosen v. Jenks*, 4 Dowl. 581. Where a demand of the execution of a deed, directed by an award, was made by a third party, the court are reported to have holden that a power of attorney was not necessary in such a case; *Kenyon v. Grayson*, 2 Smith, 61; but, strictly, in all cases where the rule requires the party to pay money, or to deliver up deeds, papers, &c. to a particular person, for his benefit, that person must make the demand, or it must be made under a power of attorney from him. But see *Woolison v. Hodgson*, 3 Dowl. 178. Where after demand made, a judge made an order to deduct certain costs from the sum demanded, it was holden that a fresh demand should be made, before an attachment could be moved for with respect to the balance. *Spivy v. Webster*, 1 Dowl. 696.

Affidavit.] Where the contempt arises from not obeying a rule of court, the affidavit must refer to the rule, which should be annexed to it; it should state a service of it upon the party, by personally delivering to him a copy, and at the same time showing him the original rule; see *ante*, p. 305; it should state a personal demand, as above directed, and at what time made; *Wadham v. Brett*, 2 Wils. 227; and if the demand have been made by a third person under a power of attorney, it should state that the original power of attorney was shown, and a copy of it delivered to him, *vide supra*, and an affidavit also of the due execution of the power of attorney must be made by the attesting witness. *Laugher v. Laugher*, 1 Tyr. 352, 1 Dowl. 284. The affidavit in other respects, also, must be drawn with certainty, showing clearly the contempt, and the parties guilty of it, &c. See *France v. Wright*, 3 Dowl. 325. As to the intitling of the affidavit, see *ante*, p. 275, and see *R. v. Stretch*, 4 Dowl. 30.

Rule, &c.] Except in cases of attachments for not obeying a subpoena, see *R. v. Stretch*, 4 Dowl. 30, and attachments against a sheriff for not obeying a rule to return the writ or bring in the body, (*vide ante*, vol. 1, p. 29, 32), there does not appear to be any time limited as to applying for the rule; for the contempt, once committed, is not purged by the delay of the other party. Even where the rule was moved for, on an affidavit made nearly three months previously, it was granted.

R. v. Rogers, 3 Dowl. 605, and see *R. v. C. D.*, 1 Chit. 723. It must be moved for by counsel; the rule will not be granted, if moved for by a private prosecutor, the motion for an attachment being deemed to be of the same nature, in this respect, as a motion for a criminal information. *Ex p. Fenn*, 2 Dowl. 527, and see, *Ex p. Pitt*, *Id.* 439. It is a rule nisi in all cases: except 1, for non-payment of costs on the master's *allocatur*, —2, in attachments against a sheriff for not obeying a rule to return a writ or to bring in the body,—3, in attachments for contempt of the court, in the execution of the process of the court, *R. T.* 17 G. 3, K. B. in which three last mentioned cases, the rule is absolute in the first instance. See *Chaunt v. Smart*, 1 B. & P. 477. *Richmond v. Bowditch*, 1 Mees. & W. 40. But the payment of costs, here mentioned, means merely costs between party and party, and not costs between attorney and client, in which latter case the rule is but a rule nisi. *Spragg v. Willis*, 2 Dowl. 531, 2 Nev. & M. 678. *Boomer v. Mellor*, 2 Dowl. 533. *Bray v. Yates*, 1 Dowl. 459. *Green v. Light*, 3 Dowl. 578. and see *Ryan v. Furnell*, 4 Dowl. 582, 1 Har. & W. 641. but see *Ex p. Burgin*, 1 Dowl. N. C. 292. So, if the rule be for the payment of costs, and also for the doing of any thing else, the rule is a rule nisi only, *Ex p. Townley*, 3 Dowl. 39. *Daniel v. Beadle et al.*, 1 Man. & Gr. 960, unless some provision to the contrary be contained in the original rule, for the not obeying of which the attachment is sought to be obtained. *Ex p. Grant*, 3 Dowl. 320. A rule for an attachment for not obeying an award, is always a rule nisi, even although it be for payment of costs only. *Thompson v. Billingsby*, 2 Chit. 57. If the rule be a rule nisi only, it cannot be moved for on the last day of term; if a rule absolute, it may. *Anon.*, 1 Burr. 651. *Anon.* 3 Smith, 118. *R. v. York*, 5 Burr. 2686.

If the rule be a rule nisi, it must be personally served; *Birkitt v. Holme*, 4 Dowl. 556, 1 Har. & W. 659. *Re Ibbertson*, 5 Dowl. 160. *Wilkinson v. Pennington*, 6 Dowl. 183; but if the party show cause against it, that will be deemed a waiver of personal service. *Levi v. Duncombe*, 1 Cr. M. & R. 737. It cannot be served on a Sunday. *M'Heham v. Smith*, 8 T. R. 86. Where there was a variance between the copy served and the rule, in the name of the defendant, and the name of the master whose *allocatur* was written upon it, the court set aside the attachment which had been granted, and discharged the party. *R. v. Calvert*, 2 Cr. & M. 189.

Against this rule, the party may show, as cause, facts and circumstances showing that he is not guilty of the contempt imputed to him, or that it was not intentional. Where an attorney sued out a writ of error, knowing that his client by a rule had undertaken not to bring one, the court refused to award an attachment against him, it appearing that he had

been advised and believed that the rule only restrained him from bringing a writ of error for delay, and not from bringing one for real error. *Camden v. Edie*, 1 H. Bl. 51. *Fuller v. Prentice*, *Id.* 49. So, where a rule nisi for an attachment had been obtained against a party for not complying with an order of the court for the production by him of certain indentures, it appeared from his affidavit in answer, that he had not the indentures in his possession, had never destroyed them, and that he had made diligent search and enquiry for them, but had not been able to find any trace of them: the court, under those circumstances, refused to make the rule absolute. *Cooke v. Tunswell*, 8 Taunt. 131. and see *Clare v. Blakesley et al.*, 1 Man. & Gr. 567. But where a rule required a party to reinstate certain premises forthwith, it was holden to be no answer to say that it would take three weeks to do so, for the party ought at least to begin promptly. *Doddington v. Hudson*, 1 Bing. 464. Where an action, brought against a tenant of certain premises for a nuisance, was defended by his landlord, who told him that his presence would not be necessary at the trial; and the landlord's attorney at the trial entered into a rule to abate the nuisance, without apprising the tenant of it; and an attachment issued for his not complying with it: the court, upon strong affidavits that the grievance complained of was not a nuisance, set aside the attachment, and granted a new trial. *Boddington v. Harris*, 1 Bing. 187. So, where an action is brought for the same matter, the court will not grant an attachment. See *ante*, p. 253. And where in the copy of the original rule served, and which was sworn to be a true copy, the name of the defendant was written "Calver" instead of "Calvert," and the name of the master to the *allocatur* was written "Day" instead of "Dax:" the court set aside the attachment, and discharged the defendant. *R. v. Calvert*, 2 Cr. & M. 189.

The attachment, and proceedings thereon.] A printed form of the attachment on parchment, is filled up by the attorney, and signed by the proper clerk at the master's office, and sealed. It is then taken to the office of the sheriff or other officer to whom it is directed, a warrant obtained on it, and given to the officer in the ordinary way, who will thereupon arrest the party. *Caption fee, one guinea.* In ordinary cases, the writ is directed to the sheriff; but attachments against the sheriff are directed to the coroners, and an attachment against the coroner is directed to elisors. *Andrews v. Sharp*, 2 W. Bl. 911. *R. v. Peckham*, 2 W. Bl. 1218. If the party be already in the custody of the keeper of the Queen's prison, he cannot be brought up to be charged with the attachment; the writ must still be lodged with the sheriff, whose officer must watch his opportunity to arrest him, as soon as he shall be out of

custody. *Boucher v. Sims*, 2 Cr. M. & R. 392. On the other hand the court will not grant a *habeas corpus* to bring up a prisoner in custody under an attachment, to enable him to move to set it aside. *Ford v. Nassau*, 9 Mees. & W. 793.

In attachments for non-payment of money or costs, the caption is in the nature of an arrest in execution, and there are no further proceedings; the party cannot be bailed, *R. v. Stokes*, 1 Cowp. 137, but must remain in custody until he pay the amount and costs, a bill of which costs is usually given to the officer to deliver to him. And the payment must be, not to the sheriff, who has in law no authority to receive it, see *Pitt v. Coombs*, 3 Nev. & M. 212, (or, if he receive it, he cannot be called upon to pay the money into court, nor can he claim poundage upon it, *R. v. Sh. of Devon*, 3 Dowl. 10), but to the opposite party or his attorney, in the same manner as upon a *ca. sa.* It is, however, so far not analogous to a *ca. sa.* that if, after the party is arrested upon it, the other party or his attorney allow him to go at large, upon an undertaking to return into custody within a certain time, and, instead of doing so, he abscond, he may be again taken on an *alias writ*; *Good v. Wilks*, 6 M. & S. 413; or if he return into custody before the return of the writ, the sheriff will not be liable to an action for an escape. *Lewis v. Morland*, 2 B. & A. 56.

But in other cases of attachment for contempt, the party must be brought into court or before a judge at chambers, at the return of the writ, and sworn to answer interrogatories. If the judge then think fit, he may enter into a recognizance with sureties, for his appearance from day to day, to answer interrogatories respecting such matters as may be objected against him; see *Re—4 D. & R. 393*; and it is not necessary to give notice of such bail, nor are they required to justify. *R. v. Hall*, 2 W. Bl. 1110. In the meantime, between the arrest and the return of the writ, I believe it is the common practice with sheriff's officers to discharge the party, on his giving a bond with sureties, in the nature of a bail bond, conditioned to appear in court at the return of the writ, and answer interrogatories, &c.

Interrogatories are then prepared upon the part of the prosecutor, engrossed on parchment, and signed by counsel, *R. M. 34 G. 3, K. B.*, and filed. The prosecutor must then rule the party to appear before the examiners to answer the interrogatories. Or in default of being so ruled, if he be still in custody, the court will allow him to be bailed. *Doe v. Stillwell*, 2 Dowl. N. C. 18. And the party must thereupon submit to be examined upon them, by the master of the Crown office in the court of Queen's Bench, or by the master in the court of Common Pleas or Exchequer; for he will not be allowed to come in and confess the contempt. *R. v. Edwards*, 4 Burr. 2105. But where the attachment is for a rescue, and the

sheriff has returned the rescue upon the writ, inasmuch as the sheriff's return in such a case is conclusive and cannot be controverted, interrogatories are useless, and the court impose the fine upon reading the sheriff's return. *R. v. Elkins*, 4 Burr. 2129. Even in that case, however, the court will put the party to answer, unless the prosecutor choose to waive it. See *R. v. Horsley*, 5 T. R. 362.

The master thereupon makes his report to the court upon a motion made by counsel for that purpose. It may be necessary to add, that this motion cannot be made on the last day of term, without the previous leave of the court. *R. v. Wheeler*, 1 W. Bl. 311. If the master report the party to be in contempt, his report is in the nature of a conviction; see *Coulson v. Graham*, 2 Chit. 57; and the court thereupon proceed to pass judgment upon the party, of fine or imprisonment or both. As to the party's bail, however, it seems that this report is not conclusive, but they may except to it; see *Re Isaacson*, 1 Bing. 272; and if the master in his report set out the facts specially, the party himself, I believe, may controvert the conclusion the master has come to; at least, I have known it to be done in practice.

SECTION V.

Execution upon rules.

By stat. 1 & 2 Vict. c. 110, s. 18, already noticed, *ante*, p. 101, it is, amongst other things enacted, that all rules of courts of common law, whereby any sum of money, or any costs, charges or expenses shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such monies, or costs, charges or expenses shall be payable, shall be deemed judgment creditors within the meaning of this act; and all remedies hereby given to judgment creditors, are in like manner given to persons to whom any monies, or costs, charges or expenses are by such rules respectively directed to be paid. As to its *liem* upon land, see *Id.* sect. 19; and see *ante*, p. 30, 31.

Under this statute, a party who has obtained a rule of court for the payment of a sum of money, or of costs which he gets taxed, may at once sue out a *fi. fa.* or *ca. sa.* for the amount, against the party ordered to pay it, without previously asking any leave of the court to do so. See *Hobson v. Paterson*, 2 Dowd. N. C. 129.

But the statute only extends to rules of court, and not to a judge's orders. And therefore in order to bring a judge's order for the payment of money or costs within the statute, so

as to enable the party to sue out an execution upon it, it is first necessary to move to make the judge's order a rule of court, after which you may sue out execution upon the rule, without any further application to the court for leave to do so. *Watson et al. v. Holcombe*, 11 *Law J.*, 190, *cp.*, and see *Hobbs v. Paterson*, 2 *Dowl. N. C.* 129. And the judge's order may be made a rule of court in vacation, as well as in term, the rule being dated on or after the day of the date of the order, and being intitled as of the preceding term, under R. G. H. 2 *Vict.*, already mentioned, *ante*, p. 288. *Badman v. Pugh*, 12 *Law J.*, 126, *cp.* In one case, the court of Exchequer seemed to think a previous demand of the costs should be made upon the order and *allocatur*, before they were made a rule of court; *Wallis v. Sheffield*, 7 *Dowl.* 793, but see *S. C.* 9 *Law J.* 2, *ex.*; in *Watson v. Holcombe*, and *Badman v. Pugh*, above cited, no such demand was deemed necessary; but at all events, if you seek to include costs of making the order a rule of court, in your execution, you must now show by affidavit that the order has been served on the party or his attorney, and disobeyed. *Vide infra*. Also, where an attorney's bill was referred to the master for taxation, under the usual undertaking, and was taxed accordingly, and the attorney then obtained a judge's order, *ex parte*, for the payment of the amount found due to him, without having demanded it, and the order being made a rule of court, he thereupon sued out execution: the court of Exchequer set aside the rule and execution as irregular. *Richards v. Patterson*, 7 *Mees. & W.* 313. The best way, however, in such a case, is, instead of making the order for taxation and the undertaking a rule of court, and demanding the amount, to apply for a rule upon the client to show cause why he should not pay the amount of the *allocatur*, serve it, and afterwards proceed to make it absolute; and then to sue out execution on this latter rule. This practice has been fully recognized by the court of Queen's Bench. *Neale v. Postlethwaite*, 1 *Ad. & El. N. C.* 243. So, where the lessor of the plaintiff in ejectment kept out of the way, so that the costs taxed upon the consent rule could not be personally demanded of him, *Patteson, J.* granted a rule to show cause why he should not pay them, in order that execution might be sued out for them when the rule should be made absolute. *Doe v. Bradley*, 1 *Dowl. N. C.* 259.

By proceeding thus to make a judge's order a rule of court, the party formerly could not include in his execution the costs of making the order a rule of court. *R. v. Gameson*, 6 *Mees. & W.* 603. *Barehead v. Hall*, 9 *Law J.*, 323, *ex.* But in Trinity term, 1840, it was resolved by all the judges, that when a judge's order is made a rule of court, it shall be a part of the rule that the costs of making the order a rule of court shall be

y the party against whom the order is made, provided an it be made and filed, that the order has been served upon erty or his attorney, and disobeyed. 12 *Ad. & El.* 1. & *Gr.* 278. 6 *Mees. & W.* 602. Where the affidavit f a service upon the defendant's "attorney or agent," on, J. held it to be sufficient. *Morris v. Bedward*, 1. 130.

to the mode of proceeding under this statute, upon an see *ante*, p. 257.

BOOK VII.

IRREGULARITY, AND THE MODE OF TAKING ADVANTAGE OF IT.

What.] A proceeding is said to be irregular, where according to the practice of the court, it is not the proper proceeding which ought to have been taken, where it has been taken too soon or too late, or in an improper manner, or where the proceeding is not in conformity with those which have preceded it, or where that proceeding which ought to have immediately preceded it has been omitted altogether. We shall give a few instances of these in their order.

Where the proceeding is not that which ought to be taken according to the practice of the court, it is not only irregular, but it is usually void altogether. Thus, where judgment was obtained against a person who was in custody of the marshal, but not at the suit of the plaintiff; and the plaintiff, instead of having him brought up by *habeas*, to have him charged in execution, merely took out the ordinary side bar rule calling upon the marshal to acknowledge him to be in his custody, and then entered the *committitur* on the roll, as is the practice where the party is in custody in the action in which he is to be charged in execution: the court held this to be a nullity, and not merely an irregularity, and discharged the defendant, even although fourteen years had elapsed since the void proceeding was had. *Smith v. Sandys*, 1 *Har. & W.* 377.

If a proceeding be had too soon,—as, for instance, if the plaintiff sign interlocutory judgment for want of a plea, before the time for pleading has expired, the judgment will be irregular, and the court will set it aside. And the same, if the proceeding be had too late,—as for instance, if the plaintiff do not declare, until after the cause is out of court, the court will set aside the declaration for irregularity. *Wynne v. Clark*, 5 *Taunt.* 649. So, if a proceeding be taken in an improper manner, not warranted by the practice of the court,—as for instance, if a writ of summons be served on a defendant, out of the county mentioned in it, and more than 200 yards from the border of it, the court will set aside the service for irregularity. See 2 *W.* 4, c. 39, s. 1.

If the proceeding be not conformable with those which have preceded it,—as for instance, if the first writ be against a defendant by one christian name, and the *alias* by another, *Corbet v. Bates*, 3 *T. R.* 660, if formerly a *capias* were against two, and the declaration against one only, *Moss v. Birch*, 5 *T. R.* 722.

Chapman v. Eland, 2 *New Rep.* 82, and see *Haigh v. Conway*, 15 *East*, 1, or if the declaration be for a different cause of action from that expressed in the writ, *Ward v. Tumman*, 4 *Nev. & M.* 876. *Thompson v. Dica*, 2 *Dowl.* 93, or if the writ be in a wrong name, and the plaintiff file a common appearance and declare against the defendant by his right name: *Dring v. Dickenson*, 11 *East*, 225. *Delanoy v. Cannon*, 10 *East*, 328. See *Hole v. Finch*, 2 *Wils.* 293. *Gould v. Barnes*, 3 *Taunt.* 504. *Oakley v. Giles*, 3 *East*, 167. *Hinton v. Stevens*, 4 *Dowl.* 283: in these and the like cases, the court will set aside the latter proceeding for irregularity.

If a party take a proceeding, having omitted another which ought to have preceded it, his proceeding will be irregular, and in most cases a nullity altogether. As for instance, where in a non-bailable action the plaintiff declared, and afterwards signed judgment as for want of a plea, no appearance having been entered either by the defendant, or by the plaintiff for him: the declaration and judgment were holden to be not only irregular but void altogether; and that the irregularity therefore could not be waived by any act of the defendant, and the application to set aside the proceedings might be made at any distance of time. *Robarts v. Spurr*, 3 *Dowl.* 551, 1 *Har. & W.* 201. Where a statute required that before an action for a penalty in a certain case, should be brought, an affidavit should be filed; and an action being brought, without filing such an affidavit, and an application being made to stay the proceedings upon this ground, it was urged in answer that the defendant had waived the irregularity by having put in bail: the court held that it was not a mere irregularity, but a nullity, which could not be waived by any act of the defendant; and they accordingly made the rule absolute. *Goodwin v. Parry*, 4 *T. R.* 577.

By R. G. M. 3 W. 4, s. 10, "if the plaintiff or his attorney shall omit to insert in, or indorse on, any writ or copy thereof, any of the matters required by stat. 2 W. 4, c. 39, to be by him inserted therein, such writ or copy thereof shall not on that account be held void, but may be set aside as irregular, upon application to be made to the court out of which the same shall issue, or any judge." So delivering a plea on a day subsequent to that on which it bears date, is an irregularity only, not a nullity. *Hodson v. Pennell*, 4 *Mees. & W.* 373.

In what cases waived.] When a proceeding is not merely irregular, but void and a nullity altogether, no act of the defendant afterwards can be construed into a waiver of the irregularity, &c. *Goodwin v. Parry*, and *Robarts v. Spurr*, *supra*. Where a plea in abatement was pleaded, without an affidavit to verify it, as required by stat. 4 Ann, c. 16, s. 11, it was holden to be a nullity, and that no subsequent act of the plain-

tiff could be construed as a waiver of his right to set it aside. *Garratt v. Hooper*, 1 Dowl. 28. Where a notice of declaration was served on a Sunday, and upon a motion to set it aside for irregularity, it was answered that the irregularity had been waived by the defendant accepting the notice, knowing it to be irregular: but the court held it to be void to all intents, by stat. 29 Car. 2, c. 7, s. 6, and could not be waived. *Morgan v. Johnson*, 1 H. Bl. 628. And the same, as to the service of process upon a Sunday. *Taylor v. Phillips*, 3 East, 155. So, a writ of summons dated on a Sunday, has been holden a nullity, and that no act of the defendant could be deemed a waiver. *Hansen v. Shackelton*, 4 Dowl. 48. So, where two persons were holden to bail in two separate actions, on one affidavit, and it was urged that they had waived the irregularity by putting in bail: the court held that it was not a mere irregularity, that might be waived, but a defect which rendered the proceeding a nullity, and that no act of the defendant could be deemed a waiver. *Hussey v. Wilson*, 5 T. R. 254.

Also, even in the case of a mere irregularity, no act of the opposite party can be deemed a waiver of it, unless it appear that he had a knowledge of it at the time. *Per Bayley, B. in Cor v. Tullock*, 2 Dowl. 48, 47. It lies however upon the party complaining of the irregularity, to show that he had no knowledge of it. *Anderson v. Earl of Stirling*, 2 Dowl. 267.

But supposing a party to have a knowledge of an irregularity in the proceedings of his opponent, he will be deemed to have waived it, by not making an application to set it aside, within the time limited for that purpose by the practice of the court. *See post*, p. 318. So he will be deemed to waive it, by taking a subsequent step in the cause. For instance, if a party take a step in a cause, he waives the obligation the other party would otherwise be under of doing what would have been requisite to compel him to take such step; *per Cur. Cohn v. Davis*, 1 H. Bl. 80. *Rogers v. Mapleback*, *Id.* 106; and therefore it has been holden that pleading supersedes the necessity of a rule to plead, even although the plea pleaded be a nullity. *Per Cur. Lockart v. Mackreth*, 5 T. R. 663, 661. By entering an appearance, the defendant waives any irregularity in the process; *Fox v. Money*, 1 B. & P. 250; but if the appearance be entered by the plaintiff for the defendant, it has no such effect. *Ledwich v. Prangnell*, 1 Moore, 292. *Chalkley v. Carter*, 4 Dowl. 480. Even the attorney for the defendant undertaking to appear for him, has been holden to be a waiver of an irregularity in the writ. *Lowes v. Clarke*, 2 Chit. 240. So, defendants giving a bail bond by their christian and surnames, has been deemed a waiver of an irregularity in the writ, which required the sheriff to take Messrs. C. & D. without mentioning their christian names. *Kingston v. Jewellyn*, 1 Brod. & B. 529. *See ante*, vol. 1, p. 154. So, obtain-

ing time to put in bail, is a waiver of an irregularity in the writ. *Moore v. Stockwell*, 6 B. & C. 76. So, putting in and perfecting bail, *Jones v. Price*, 1 East, 81. *Chapman v. Snow*, 1 B. & P. 132, or merely putting it in, *D'Argent v. Virant*, 1 East, 330, is a waiver of a defect or irregularity in the affidavit to hold to bail. See *Hodgson v. Dowell*, 3 Mees. & W. 285. So, if a defendant accept a declaration, and act as if he had appeared, he cannot afterwards object to a judgment against him, on the ground that no appearance had been entered for him. *Williams v. Strahan*, 1 New Rep. 309. but see *Roberts v. Spurr*, ante, p. 315. So, taking a declaration out of the office, is a waiver of any informality in the affidavit to hold to bail, *Kennett & Aron Canal Comp. v. Jones*, 7 T. R. 451, or writ, *Whale v. Fuller*, 1 H. Bl. 222, and see *Archer v. Barnes*, 3 East, 342, or notice of declaration; *Heywood v. Payrer*, 1 Dowl. N. C. 256; but not of an irregularity, which is first disclosed by the declaration itself. *Chapman v. Eland*, 2 New Rep. 82. *King v. Horne*, 4 T. R. 349. By pleading, the defendant waives an irregularity in the declaration, *Bartism v. Williams et al.* 4 Bing. N. C. 301, and rule to plead; see *Perry v. Fisher*, 6 East, 549; and by pleading to a declaration on a *scire facias*, the defendant was holden to waive an irregularity in the writ, although a motion to set aside the writ for the irregularity was pending at the time he pleaded. *Sloman v. Gregory*, 1 D. & R. 181. But where a rule nisi to set aside a *sci. fa.* was obtained on the last day of term, and not being a stay of proceedings, the defendant appeared to the *sci. fa.* in order to prevent judgment: the court held that his appearance was no waiver of the irregularity in the writ. *Coxeter v. Burke*, 5 East, 461. So, where in debt on bail bond, oyer being demanded and refused, the defendant, in order to prevent judgment, pleaded a plea which did not require oyer, being merely a denial of the assignment of the bond to the plaintiff; this was holden not to be a waiver of his right to oyer. *Goodricke v. Turley*, 4 Dowl. 431, and see *Tory v. Stevens*, 6 Dowl. 275. Applying for time to plead, is a waiver of a rule to plead. *Towers v. Powell*, 1 H. Bl. 87. But where an application was made to a judge at chambers in vacation, to set aside a declaration for irregularity, who refused to make an order, and also refused to stay the proceedings until the defendant could apply to the court, and the defendant then applied for and obtained time to plead: this was holden to be no waiver of the irregularity in the declaration. *Woodcock v. Kelby*, 1 Mees. & W. 41. Formerly, when pleas were filed, a plaintiff, by taking a plea out of the office, was holden to waive the objection that it was pleaded by a new attorney, without an order to change the former one. *Margereu v. Michlewaine*, 2 New Rep. 509. Where the defendant, after notice of declaration, requested that further proceedings

should be stayed, and promised to pay the debt and costs: the court held this to be a waiver of an irregularity in the writ and service; *Raues v. Knight*, 1 Bing. 132; but merely asking for time to pay the debt, &c., is no waiver of a preceding irregularity. *Anon.* 1 Dowl. 23. Taking out and serving a summons to stay proceedings on a bail bond, is a waiver of an irregularity in the notice of declaration. *Davis v. Owen*, 1 B. & P. 342. Suing out a writ of error, is a waiver of an irregularity in the record. *Ouchterlony v. Gibson*, 12 Law J. 94, *cp.* And applying to set aside proceedings on the ground of a certain irregularity, is a waiver of any other irregularity then known to exist. *Thorpe v. Beer*, 2 B. & A. 373. Indeed the general rule of practice upon this subject is, that if a party overlook an irregularity, and take a subsequent step in the cause, he cannot afterwards revert back to the irregularity, and object to it. *Per* *Ld. Kenyon*, C. J. 1 *East*, 78. and see *Rogers v. Mapleback*, 1 H. Bl. 106. *Brown v. Wildbore*, 1 Man. & Gr. 276. and see R. G. H., 2 W. 4, s. 33, *infra*. But attending the taxation of costs upon a judgment by default in debt, is no waiver of an irregularity in the judgment. *Archer v. Garrard*, 6 Dowl. 132.

Besides the implied waiver, of which we have just now given many instances, there may of course be also an express waiver of an irregularity. As for instance, where a defendant agreed to accept service of a writ of summons, in order to avoid further expense, although he knew that more than four months had expired from the time it was sued out, this was holden to be a waiver of the objection to the writ. *Cootes v. Sandy*, 9 Dowl. 381.

When motion to be made.] Formerly the practice of the courts differed upon this subject: in the King's Bench, the application must have been made within a reasonable time; in the Common Pleas, immediately after the irregular party had taken the next step; and in the Exchequer, during the term in or after which the irregularity occurred. *Anon.* 1 Chit. 14. But now, in all these courts, it is ordered, by R. G. H. 2 W. 4, s. 33, that "no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity." If the irregularity be in the affidavit to hold to bail, the motion must be made within the time limited for putting in bail. *Tucker v. Colegate*, 1 Dowl. 574. See *Firley v. Rallett*, 2 Dowl. 708. *Johnson v. Kennedy*, 4 Dowl. 345. *Fowell v. Petre*, 5 Dowl. 276. If the irregularity be in the writ, the application must be made within the time limited for the defendant's appearance, *Tyler v. Green*, 3 Dowl. 439. *Child v. Marsh*, 3 Mees. & W. 433. 6 Dowl. 576. *Edwards v. Collins*, 5. Id. 227. and see *Smith*

v. Webb, 2 Mees. & W. 879. *Daly v. Mahon*, 4 Bing. N. C. 8. *Brashour v. Russell*, 4 Id. 31, even in the case of a service in a wrong county. *Davis v. Sherlock*, 7 Dowl. 580. If the irregularity be in the declaration, the application must be made within four days after notice of declaration served, *Willis v. Ball*, 1 Dowl. N. C. 303. *Hinton v. Stevens*, 4 Dowl. 283. *Golding v. Scarborough*, 2 Har. & W. 94. *Kitchin v. Brooks*, 5 Mees. & W. 522. *Cumming v. Elwin*, 3 Bing. N. C. 882. and see *Herbert v. Darley*, Id. 726. *Alsager v. Crisp*, 10 Law J., 130, *qb.* or declaration delivered. See *Fynn v. Kemp*, 2 Dowl. 620. If the irregularity be in an interlocutory judgment, the time for making the application begins to run from the first notice the defendant has of the judgment being signed; and the application must be made within a reasonable time after that, *Grant v. Flower*, 5 Dowl. 419. see *Amos v. Smith*, 7 Dowl. 866, otherwise the court will not entertain it, upon any terms. See *Lewis v. Brown*, 3 Dowl. 700. *Roberts v. Cuttill*, 4 Dowl. 204. Where the defendant was first informed of the judgment by the notice of enquiry, the court held that he was not too late in moving to set it aside, on the day for which notice of inquiry was given. *Hill v. Mills*, 2 Dowl. 696. but see *Scott v. Cogger*, 3 Dowl. 212, *cont.* But an application to set aside a *ca. sa.* against the principal, by bail, ten days after proceedings were commenced against them, was holden to be too late. *Pocock v. Cockerton*, 7 Dowl. 21. and see *Thomas v. Harris*, 1 Dowl. N. C. 793. *Weedon v. Garcia*, 2 Id. 64. And the application must be made, not only within a reasonable time, but before the irregular party has taken the next step, however short the time may be for doing it. *Per Parke, B. in Fynn v. Kemp*, *supra*. And therefore where a defendant moved to set aside an interlocutory judgment, for an irregularity in the notice of declaration, the court held that he was too late; he should have moved to set aside the notice of declaration. *Smith v. Clarke*, 2 Dowl. 218. and see *Minster v. Coles*, 2 Chit. 237. And this, although the second step be also irregular. *Rutty v. Arbur*, 2 Dowl. 36. Where eight days' notice of inquiry was given, instead of fourteen, and the defendant two days before the time appointed for executing the writ, merely gave notice that he should move to set aside the proceedings for irregularity, without stating what the irregularity was, and the writ was executed: the court, although they set aside the execution of the writ for irregularity, did so without costs, saying that the proper mode of proceeding would have been, to return the notice of inquiry. *Stevens v. Pell*, 2 Cr. & M. 421.

If the irregularity occur in vacation, the opposite party may apply to a judge at chambers to set aside the irregular proceeding; and he must make the application to a judge,

where, by waiting until the term, more than a reasonable time would elapse; and if either party be dissatisfied with the judge's decision upon the subject, he may apply to the court on the first day of the term. *Woodcock v. Kilby*, 4 Dowl. 730. *Dosd. Parr v. Roe*, 1 Ad. & El. N. C. 700. Where a defendant in vacation was irregularly served with process, it was holden that he ought not to wait until the term, to move the court, but should have applied to a judge in the vacation, if he wished to take advantage of the irregularity. *Cox v. Tullock*, 1 Cr. & M. 531. *Quilters v. Neely*, 9 Dowl. 139. So, where the time limited by the practice of the court, for objecting to a writ for irregularity, expired on the last day of the vacation, and the application was made to the court on the first day of term, the court held it to be too late; the party should have applied at chambers. *Tyler v. Green*, 3 Dowl. 439; and see *Hinton v. Stevens*, 4 Dowl. 283. *Lewis v. Davison*, 3 Dowl. 272. Where the application is first made to a judge at chambers, and refused, in applying to the court afterwards, there must be an affidavit of the fact, or the rule must be drawn up on reading the judge's order. *Shugars v. Concannon*, 7 Dowl. 391. If the application be not made in time, a satisfactory excuse must be given by affidavit for the delay; *Herbert v. Darley*, 4 Dowl. 726; where the excuse was, that a witness, whose affidavit was necessary to sustain the application, had been very ill, it was holden insufficient, as a commissioner might have been sent to him, to take his affidavit; *Orton v. France*, 4 Dowl. 598; so, that the delay was occasioned by the party being obliged to change his attorney, has been holden insufficient; *Golding v. Scarborough*, 2 Har. & W. 94; so, that the party conducted the cause in person and was not aware of the irregularity in time, has been holden not sufficient. *Curvey et al. v. Bowker*, 9 Dowl. 523.

The circumstance of the party objecting, being a prisoner, makes no difference in this respect. *Primrose v. Baddeley*, 2 Cr. & M. 468; and see ante, p. 233, *Greenshield v. Pritchard*, 8 Mees. & W. 148. *R v. Burgess*, 8 Ad. & El. 275.

The rule, &c.] The rule of course is a rule to show cause, which is afterwards made absolute or discharged in the ordinary way. Care should be taken to state correctly in it, the proceeding in which the irregularity is alleged to be. Where the writ was irregular, but the service of it regular, and the motion was to set aside the service for irregularity, the court discharged the rule. *Hasker v. Jarman*, 1 Cromp. & M. 408. So, where the rule was to set aside the writ for irregularity, and the irregularity was not in the writ, but in the service of it, the court discharged the rule with costs. *Huggitt v. Parkin*, 1 Bing. 65. Where the irregularity was in the copy served, and perhaps in the writ itself, it not being in the form

given by the statute, and the application was to set aside the copy: the court held it to be erroneous, as it did not appear that the copy was not a true one; the motion ought to have been to set aside the service, or the copy or service. *Hall v. Redington*, 5 Mees. & W. 605. *Crow v. Field*, 8 Dowl. 231. *Kenny v. Bishop*, 9 Id. 57. Where an action was commenced on a bail bond, before it was forfeited, and the motion was to set aside the service of the writ for irregularity, the court held that the motion should have been to set aside the writ itself, and not the service, and discharged the rule with costs. *Edwards v. Danks*, 4 Dowl. 357. So, where the rule was to set aside a judgment for irregularity, and the objection to the judgment was that it was signed against good faith, the court discharged the rule with costs. *Smith v. Clarke*, 2 Dowl. 218. The rule nisi should require the opposite party to pay costs, otherwise the court will not make it absolute with costs. *R. v. Sh. of Middlesex*, 2 Dowl. 5. Also, it will be no stay of proceedings, unless it specially direct that proceedings be stayed in the mean time; but to entitle the party to make it a stay of proceedings, a previous notice of motion is required in the Common Pleas, *Rolfe v. Brown*, 1 Hodg. 27, and Exchequer, *Forster v. Jones*, 1 Dowl. 524, although not in the court of Queen's Bench, *Stratton v. Regan*, 2 Dowl. 585.

The affidavit, upon which the motion is made, should state the dates of the proceedings, or other matter, from which the irregularity may be apparent. And the irregular proceeding must be stated distinctly; for instance, in moving to set aside an interlocutory judgment, it must be stated distinctly that the judgment has been signed; it will not be sufficient to say that the defendant has been served with a rule to compute, *Classey v. Drayton*, 8 Dowl. 184, or the like. It is not necessary to make any affidavit of merits. *Williams v. Williams*, 2 Cr. & M. 473. *Claridge v. Mc Kenzie*, 12 Law J., 131, cp.

If the irregular party, instead of showing cause against the rule, wish to abandon the irregular proceeding, so as to avoid any further costs, he may do so, by giving the other party a notice to that effect and offering to pay the costs up to that time. Where a rule nisi had been obtained for setting aside a proceeding for irregularity, and the opposite attorney thereupon offered to waive the irregular proceeding and to pay costs, but the rule was persisted in; the court made the rule absolute, with costs up to the time of the offer, and ordered the plaintiff's attorney to pay the costs subsequently incurred. *Hulton v. Stoking*, 2 Tyr. 165, and see *Robinson v. Stoddart*, 5 Dowl. 266. If this be not done, the rule is made absolute or discharged, as in ordinary cases.

If the rule nisi be drawn up with a stay of proceedings, the proceedings are thereby suspended for all purposes, until the rule is disposed of. *Swayne v. Crammond*, 4 T. R. 176. And

the parties have the same time allowed them for taking their next proceeding, which they had at the time the rule *nisi* was served; with one exception, namely, where the rule is obtained by a defendant, and is afterwards discharged, in that case, if the time for taking his next step would have then elapsed, supposing the application not to have been made, the defendant is only allowed the remainder of the day on which the rule is discharged, for the purpose of taking his next step. *Hughes v. Walden*, 5 B. & C. 770. *Vernon v. Hodgins*, 1 Mees. & W. 151. See *St. Hanlaira v. Byam*, 4 B. & C. 970.

In the court of Queen's Bench, if the rule be "discharged generally, without any special direction upon the matter of costs, it is understood to be discharged with costs; and the latter rule must be discharged accordingly." *R. M.* 37 G. 3. In the other two courts, if the rule be discharged, the party succeeding must apply for costs. If the rule be made absolute generally, the party succeeding will be entitled to costs, if the rule *nisi* have been drawn up with costs; otherwise not. *R. v. Sh. of Middlesex*, 2 Dowl. 5. In either case the court will not excuse the party, against whom they decide, from the payment of costs, unless some very strong grounds of exemption be shown to them. If the rule be discharged, merely for some formal objection to the affidavits, or the like, the court consider the costs to be in their discretion, and usually refuse them. See *Harris v. Matthews*, 4 Dowl. 608. Where an interlocutory judgment was set aside for irregularity with costs, and the defendant then pleaded, and the plaintiff replied; and a judge at chambers thereupon gave the defendant time to rejoin until three days after the costs of the rule should be paid, which had of course the effect of staying the proceedings in the action: the court held that the judge had authority to do so. *Wenham v. Downes*, 5 Nev. & M. 244.

APPENDIX.

is of Proceedings in the Courts of Law at Westminster.

Postea in debt.

wards, that is to say, on the day and at the place contained, before the Right Honourable Thomas Lord an (or Sir Nicholas Conyngham Tindal, Knight) the Justice within mentioned, A.—C.—Esquire being asso- to the said Chief Justice [or in country causes "before William Wightman Knight, one of the Justices of our Lady ueen, assigned to hold pleas before the Queen herself, ir Thomas Coltman, Knight, one of the Justices of our the Queen of the Bench" or Sir James Parke Knight, one e Barons of the Exchequer of our Lady the Queen, es of our said Lady the Queen assigned to hold the s in and for the County of—] according to the form : statute in such case made and provided, come as well ithin-named John Nokes as the within-named Joseph by their respective attornies within-mentioned; and rors of the jury, whereof mention is within made, being oned, also come, who, to speak the truth of the matters contained, being chosen, tried, and sworn,* say upon ath that [*&c. stating the affirmative of what the defendant plea denies, and in the same terms; as, for instance, where ea is nunquam indebitatus*," that the said Joseph Styles ebted to the said John Nokes in the said sum of £— i demanded, in manner and form as the said John Nokes within complained against him;" or *where the plea is Nil in a qui tam action* "that the said Joseph Styles doth o our said Lady the Queen, or, the poor of the said of —, and to the said John Nokes who sues as i mentioned, the said sum of £— within demanded, nner and form as the said John Nokes hath within com- d against him;" or, *where the plea is Non est factum*, the writing obligatory, or, indenture, or, articles of agree- or, deed poll, within mentioned, is the deed of the said h Styles, in manner and form as the said John Nokes within in that behalf alleged."] And they assess the ges of the said John Nokes, on occasion of the detaining ithin debt, over and above his costs and charges by him

about his suit in this behalf expended to [one shilling,] and for those costs and charges to forty shillings: Therefore, &c.

. To be written on the back of the *Nisi Prius* Record. It is necessary to observe that there are no damages in a *qui tam* action, and no costs unless given by the particular statute on which the action is founded.

[*Ante*, p. 24.]

Postea in covenant.

Same as in debt, to the asterisk, and then thus:*] Say upon their oath that the indenture [or, "articles of agreement," or, "deed poll"] within mentioned, is the deed of the said Joseph Styles, in manner and form as the said John Nokes hath within in that behalf alleged; and they assess the damages of the said John Nokes by reason of the breaches of covenant within as-signed, over and above his costs and charges by him about his suit in this behalf expended, to [one hundred pounds,] and for those costs and charges to forty shillings, Therefore, &c.

Postea in assumpsit.

Same as in debt, to the asterisk, and then thus:*] Say upon their oath, that the said Joseph Styles did [undertake and] promise, in manner and form as the said John Nokes hath within complained against him; and they assess the damages of the said John Nokes by reason of the not performing the promises [and undertakings] within mentioned, over and above his costs and charges by him about his suit in this behalf expended, to [one hundred pounds,] and for those costs and charges to forty shillings. Therefore, &c.

Postea in trespass case or trover.

Same as in debt, to the asterisk, and then thus:*] Say upon their oath, that the said Joseph Styles is guilty of the [trespass or premises] within laid to his charge, in manner and form as the said John Nokes hath within complained against him: and they assess the damages of the said John Nokes by reason thereof, over and above his costs and charges by him about his suit in this behalf expended, to [one hundred pounds,] and for those costs and charges to forty shillings. Therefore, &c.

Postea upon a nonsuit.

Same as in debt to the asterisk, and then thus:*] withdrew

On the bar here, to consider of the verdict to be by them given of and upon the premises; and after they had considered thereof and agreed among themselves, they returned to the court here to give their verdict in this behalf. Whereupon the said John Nokes, being solemnly called, comes not, nor does he either prosecute his writ against the said Joseph Styles. Therefore, &c.

Postea upon a verdict for the defendant.

Same as in debt ante, p. 323, to the asterisk, and then thus;]* say on their oath, [that the said Joseph Styles is not guilty of several trespasses [or, in ejectment, "trespasses and ejectment,"] within laid to his charge, in manner and form as the said John Nokes hath within complained against him:] Therefore, &c.

Or in case or trover.] That the said Joseph Styles is not guilty of the premises within laid to his charge, in manner and form as the said John Nokes hath within complained against him. Therefore, &c.

Or in assumpsit.] That the said Joseph Styles did not [understand] promise, in manner and form as the said John Nokes hath within complained against him: therefore, &c.

Or in debt, upon nunquam indebitatus.] That the said Joseph Styles never was indebted to said John Nokes, in manner and form as the said John Nokes hath within complained against him: therefore, &c.

Or in debt qui tam.] That the said Joseph Styles doth not owe to [our Lady the Queen, or, "the poor of the parish of — within mentioned,"] and to the said John Nokes, or either of them, the within mentioned sum of—, or any part thereof, in manner and form as the said John Nokes, who sues as within mentioned, hath within complained against him: therefore, &c.

Or in debt or covenant, where non est factum was pleaded.] That the writing obligatory, [or, "indenture," or, "articles of agreement," or, "deed poll," as in the plea] is not the deed of the said Joseph Styles, as the said John Nokes hath within complained against him: therefore, &c.

* To be written on the back of the Nisi Prius Record.
[Ante p. 24.]

Form of judgment for the plaintiff, in assumpsit.

Copy the issue to the end of the award of the venire, and proceed as follows :] Afterwards, the jury between the parties is respited until the [return of *distringas* or *habeas corpora*] day of —, unless — shall first come on the [day of sittings or *nisi prius*] day of —, at —, according to the form of the statute in that case made and provided for default of the jurors, because none of them did appear.

Afterwards, on the [day of signing final judgment] day of —, come the parties aforesaid, by their respective attornies aforesaid, [or as the case may be] ; and —, before whom the said issue was tried, hath sent hither his record, had before him, in these words :

[*Copy postea.*]

Therefore it is considered that the said A. B. do recover against the said C. D. his said damages costs, and charges, by the jurors aforesaid, in form aforesaid, assessed; and also — for his costs and charges, by the court here adjudged of increase to the said A. B. with his assent, which said damages, costs and charges, in the whole, amount to —, and the said C. D. in mercy, &c. *R. G. H. 4 W. 4, r. 2, sch. No. 3.*

[*Ante*, p. 24.]

Scire facias to revive a judgment for plaintiff, after a year.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith, to the Sheriff of —, greeting : Whereas John Nokes lately [in our court before us at Westminster, or in C. B. "in our court of the bench at Westminster, before Sir —, Knight, and his companions, our Justices of the said bench"], by our writ, and by the judgment of the same court, recovered against Joseph Styles [as well a certain debt of £— as also £— which in our same court were awarded to the said John Nokes for his damages which he sustained, as well by reason of detaining the said debt, as for his costs and charges by him about his suit in that behalf expended, or if in any other action but debt, then—£— which in our same court were awarded to the said John Nokes for his damages which he sustained, as well by reason of," &c. as in a *Fi. Fa.* for plaintiff in such action to the words] "whereof the said Joseph Styles is convicted, as by the record and proceedings thereof, still remaining in our same court, manifestly appears. And now, on behalf of the

said John Nokes, in our same court, we are informed that although judgment be thereupon given, yet execution of the [debt and] damages aforesaid still remains to be made to him; wherefore the said John Nokes hath humbly besought us to provide him a proper remedy in this behalf; and we, being willing [that what is just in this behalf should be done, *or in C. B.* "that those things, which in our same court are rightly done, should be duly carried into execution, and that what is just in this behalf should be done"], command you that by honest and lawful men of your bailiwick, you make known to the said Joseph Styles that he be [before us at Westminster on —, *or in C. B.* "before our Justices at Westminster"] on —, to shew if he has or knows of any thing to say for himself why the said John Nokes ought not to have execution against him of the [debt and] damages aforesaid, according to the force, form, and effect of the said recovery, if it shall seem expedient for him so to do; and further to do and receive what, [our said court before us, *or in C. B.* "our said Justices"] shall then and there consider of him in this behalf: and have you there the names of those by whom you shall so make known to him, and this writ. Witness Thomas Lord Denman [*the Chief Justice of B. R. or C. P., or in Ex. the Chief Baron*], at Westminster, the — day of —, in the — year of our reign. [Ante, p. 34.]

WRITS OF EXECUTION.

"It is ordered, That the following forms of writs, framed by the judges pursuant to the statute 1 & 2 Victoria, c. 110, s. 20, be used from and after the first day of March next, with such alterations as the nature of the action, the description of the court in which the action is depending, the character of the parties, or the circumstances of the case may render necessary; but that any variance, not being in matter of substance, shall not affect the validity of the writs sued out." *R. G. H. 2 Vict.*

No. I.

Writ of elegit upon a judgment in the court of Q. B. in an action of assumpsit.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of — greeting. Whereas A. B., lately in our court before us at Westminster, by the judgment of the same court, recovered against C. D. £—, which, in our said court

before us, were adjudged to the said A. B., for his damages which he had sustained, as well on occasion of the not performing of certain promises and undertakings then lately made by the said C. D. to the said A. B. as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record, and afterwards the said A. B. came into our said court before us, and, according to the form of the statutes in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the — day of —, in the year of our Lord —, on which day the judgment aforesaid was entered up, or at any time afterwards, or over which the said C. D. on the said — day of — [*the day on which the judgment was entered up*], or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, according to the form of the said statutes, until the damages aforesaid, together with interest upon the said sum of £—, at the rate of four pounds *per centum* per annum, from the — day of —, in the year of our Lord — [*the day on which the judgment was entered up*], shall have been levied. Therefore we command you that, without delay, you cause to be delivered to the said A. B. by a reasonable price and extent all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said — day of — [*the day on which the judgment was entered up*], or at any time afterwards, or over which the said C. D. on the said — day of —, or at any time afterwards had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels; and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the damages aforesaid, together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our

writ, make appear to us at Westminster, immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, the — day of —, in the year of our Lord —.

[*Ante*, p. 96.]

No. II.

Writ of elegit on a rule made in the court of Q. B. for payment of money.

Victoria, &c., to the Sheriff of — greeting. Whereas lately in our court before us at Westminster, by a rule of the said court entitled, &c. [*as the case may be*] the sum of £—— was by the said court ordered to be paid by C. D. to A. B. and afterwards the said A. B. came into our said court before us, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D. or any person in trust for him, was seised, or possessed of, on the — day of —, in the year of our Lord —, on which day the said rule was made, or at any time afterwards or over which the said C. D. on the said — day of — [*the day on which the rule was made*], or at any time afterwards, had any disposing power which he might without the assent of any other person exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £——, together with interest upon the said sum of £——, at the rate of four pounds *per centum per annum*, from the said — day of —, in the year of our Lord —, [*the day on which the rule was made*], shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B. by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick as the said C. D. or any person in trust for him, was seised or possessed of, on the said — day of — [*the day on which the rule was made*],

or at any time afterwards, or over which the said C. D. on the said — day of —, or at any time afterwards, had any disposing power which he might without the assent of any other person exercise for his own benefit to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £—, together with interest as aforesaid, shall have been levied, and in what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, the — day of —, in the year of our Lord —.

[*Ante*, pp. 101, 311.]

No. III.

Writ of elegit on a rule made in the court of Q. B. for payment of money and costs.

Victoria, &c., to the sheriff of — greeting. Whereas, lately in our court before us at Westminster, by a rule of the said court, entitled, &c. [*as the case may be*] the sum of £— was, by the said court, ordered to be paid by C. D. to A. B., together with the costs of the said rule, which said costs were afterwards on the — day of —, taxed and allowed by our said court at the sum of £—. And afterwards, the said A. B. came into our said court before us, and according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the — day of — in the year of our Lord — [*the day on which the costs of the rule were taxed,*] or at any time afterwards, or over which the said C. D. on the said — day of —, or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £— and £—

together with interest upon the said two several sums of £— and £—, at the rate of four pounds *per centum* per annum, from the said—day of—[*the day on which the costs of the rule were taxed*] shall have been levied. Therefore we command you, that without delay, you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said—day of—, [*the day on which the costs of the rule were taxed*] or at any time afterwards, or over which the said C. D. on the said—day of—, or at any time afterwards had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B., as his proper goods and chattels; and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £— and £—, together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us at Westminster immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, the—day of—, in the year of our Lord—.

[*Ante*, pp. 101, 311.]

No. IV.

Writ of elegit on a judgment of an inferior court in an action of assumpsit removed into the court of Q. B.

Victoria, &c., to the sheriff of—greeting. Whereas A. B., lately in [*insert the style of the court*], by the judgment of the said court, recovered against C. D. the sum of £—, which, in the said court, were adjudged to the said A. B., for his damages which he had sustained, as well on occasion of the not performing of certain promises and undertakings, then lately made by the said C. D. to the said A. B., as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record. And whereas the said judgment was afterwards, on the—day of—, in the year of our Lord—, removed into our court before us at Westminster, by virtue of an order of our

said court before us at Westminster [or of —, one of the justices of our said court before us at Westminster, as the case may be], in pursuance of the statute, in that case made and provided, and the costs attendant upon the application for the said order and upon the said removal were afterwards, on the — day of — in the year of our Lord —, taxed and allowed by our said court, before us at Westminster, at the sum of £—. And afterwards the said A. B. came into our said court before us at Westminster, and according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D. or any person in trust for him, was seised or possessed of, on the said — day of — in the year of our Lord — aforesaid, [the day on which the costs of removing the judgment were taxed], or at any time afterwards, or over which the said C. D., on the said — day of —, or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the damages aforesaid and the said costs so taxed and allowed by our said court before us at Westminster as aforesaid, together with interest upon the said two several sums of £ — and £ —, at the rate of four pounds *per centum* per annum, from the — day of — aforesaid, [the day on which the costs of removing the judgment were taxed], shall have been levied. Therefore we command you, that without delay, you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D., in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of, on the said — day of —, [the day on which the costs of removing the judgment were taxed], or at any time afterwards, or over which the said C. D., on the said — day of —, or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B., as his proper goods and chattels; and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the damages

aforesaid, and the said costs so taxed and allowed by our said court before us at Westminster as aforesaid, and interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us at Westminster immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, the — day of —, in the year of our Lord —.

[*Ante*, p. 102.]

No. V.

Writ of elegit on an order for payment of money made in an inferior court and removed into the court of Q. B.

Victoria, &c., to the sheriff of —, greeting. Whereas lately in [*insert the style of the court*], by a rule of the said court entitled, &c. [*as the case may be*] the sum of £ — were by the said court ordered to be paid by C. D. to A. B.; and whereas the said rule was afterwards on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by virtue of an order of our said court before us at Westminster [*or of —, one of the justices of our said court before us at Westminster, as the case may be*], in pursuance of the statute in that case made and provided, and the costs attendant upon the application for the said last mentioned order, and upon the said removal, were afterwards, on the — day of —, in the year of our Lord —, taxed and allowed in our said court before us at Westminster, at the sum of £ —; and afterwards the said A. B. came into our said court before us at Westminster, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D. or any person in trust for him, was seised or possessed of on the said — day of —, in the year of our Lord —, [*the day on which the costs of removing the rule of the inferior court into the court of Q. B. were taxed*], or at any time afterwards, or over which the said C. D., on the said — day of —, or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his pro-

per goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £— and £—, together with interest on the said two several sums of £— and £—, at the rate of four pounds *per centum* per annum, from the said — day of —, [*the day on which the costs of removing the rule of the inferior court into the court of Q. B. were taxed*], shall have been levied. Therefore we command you, that without delay, you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick as the said C. D. or any one in trust for him, was seised or possessed of, on the said — day of —, [*the day on which the costs of removing the rule of the inferior court into the court of Q. B. were taxed*], or at any time afterwards, or over which the said C. D., on the — day of —, or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £— and £—, together with interest as aforesaid, shall have been levied; and in what manner you shall have executed this our writ make appear to us at Westminster, immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ.

Witness, Thomas Lord Denman, at Westminster, the — day of —, in the year of our Lord —.

[*Ante*, p. 102.]

No. VI.

Writ of elegit on a rule for payment of money and costs, made in an inferior court, and removed into Q. B.

Victoria, &c., to the Sheriff of — greeting. Whereas lately in [*insert the style of the court*], by a rule of the said court, entitled, &c. [*as the case may be*], the sum of £—, was by the said court ordered to be paid by C. D. to A. B., together with the costs of the said rule, which said costs were

rds, on the — day of —, in the year of our Lord
 axed and allowed by the said court, at the sum of £—;
 ereas the said rule was afterwards, on the — day of
 the year of our Lord —, removed into our court
 is at Westminster, by virtue of an order of our said
 efore us at Westminster [or of —, one of the justices
 aid court before us at Westminster, as the case may be],
 nance of the statute in that case made and provided,
 costs and charges attendant upon the application for
 last-mentioned order, and upon the said removal, were
 rds on the — day of —, in the year of our Lord
 axed and allowed in our said court before us at the
 £—; and afterwards the said A. B. came into our
 urt before us at Westminster, and according to the form
 statute in such case made and provided, chose to be
 id to him all the goods and chattels of the said C. D. in
 ilitywick, except his oxen and beasts of the plough, and
 such lands, tenements, rectories, tithes, rents, and
 aments, including lands and hereditaments of copyhold
 omary tenure, in your bailiwick, as the said C. D. or
 on in trust for him was seised or possessed of on the
 — day of — [the day on which the costs of removing
 of the inferior court into the court of Q. B. were taxed],
 ny time afterwards, or over which the said C. D. on the
 — day of —, or at any time afterwards had any dis-
 power which he might, without the assent of any other
 , exercise for his own benefit, to hold to him the said
 und chattels as his proper goods and chattels, and to
 e said lands, tenements, rectories, tithes, rents, and
 aments respectively, according to the nature and tenure
 , to him and to his assigns until the said three several
 f £— and £—, and £—, together with interest
 he said three several sums of £—, and £—, and
 at the rate of four pounds *per centum* per annum,
 e said — day of — [the day on which the costs of
 ng the rule of the inferior court into the court of Q. B.
 axed], shall have been levied. Therefore we command
 at without delay you cause to be delivered to the said
 by a reasonable price and extent, all the goods and
 s of the said C. D. in your bailiwick, except his oxen
 asts of the plough, and also all such lands, tenements,
 es, tithes, rents, and hereditaments, including lands and
 aments of copyhold or customary tenure in your baili-
 as the said C. D. or any person in trust for him was
 or possessed of, on the said — day of —, or at any
 ertwards, or over which the said C. D. on the said —
 —, or at anytime afterwards, had any disposing power
 he might without the assent of any other person exer-

cise for his own benefit, to hold the said goods and chattels to the said A. B., as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said three several sums of £—, and £—, and £—, together with interest as aforesaid shall have been levied; and in what manner you shall have executed this our writ, make appear to us at Westminster immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, the — day of —, in the year of our Lord —.

[*Ante*, p. 102.]

No. VII.

Writ of fieri facias on a judgment in the court of Q. B. in an action of assumpsit.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of —, greeting. We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made £—, which A. B. lately in our court before us at Westminster recovered against him for his damages which he had sustained, as well on occasion of the not performing certain promises and undertakings, then lately made by the said C. D. to the said A. B., as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record, together with interest upon the said sum of £—, at the rate of four pounds *per centum* per annum, from the — day of —, in the year of our Lord — [*the day on which the judgment was entered up,*] on which day the judgment aforesaid was entered up; and have that money with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for his damages and interest as aforesaid, and that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf; and in what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

[*Ante*, p. 90.]

No. VIII.

Writ of fieri facias on an order of the court of Q. B. for payment of money.

Victoria, &c., to the Sheriff of —, greeting. We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made £—, which lately in our court before us at Westminster, by a rule of our said court entitled, &c. [*as the case may be*] were by the said court ordered to be paid by the said C. D. to A. B., and that of the said goods and chattels of the said C. D. in your bailiwick you further cause to be made interest upon the said sum of £—, at the rate of four pounds *per centum* per annum from the — day of —, in the year of our Lord —, [*the day on which the rule was made*] on which day the said rule was made; and have that money, together with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for the said sum of money so ordered to be paid by the said C. D. to the said A. B. and for interest as aforesaid, and that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf; and in what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.
[*Ante*, pp. 101, 311.]

No. IX.

Writ of fieri facias on an order of the court of Q. B. for payment of money and costs.

Victoria, &c., to the Sheriff of —, greeting. We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made £—, which lately in our court before us at Westminster, by a rule of our said court entitled, &c. [*as the case may be*] were by the said court ordered to be paid by the said C. D. to A. B., together with the costs of the said rule, which said costs were afterwards, on the — day of —, in the year of our Lord —, taxed and allowed by our said court at the sum of £—, and that of the said goods and chattels of the said C. D. in your bailiwick you further cause to be made interest upon the said two several sums of £— and £—, at the rate of four pounds *per centum* per annum, from

the said — day of —, in the year of our Lord — [*the day on which the costs of the rule were taxed*]; and have that money, together with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for the said sum of money so ordered to be paid by the said C. D. to the said A. B. and for costs and interest as aforesaid; and that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in this behalf; and in what manner you shall have executed this our writ make appear to us at Westminster, immediately after the execution thereof, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

[*Ante*, pp. 101, 311.]

No. X.

Writ of fieri facias on a judgment of an inferior court, in an action of assumpsit, removed into the court of Q. B.

Victoria, &c., to the Sheriff of —, greeting. We command you, that of the goods and chattels of C. D. in your bailiwick, you cause to be made £—— which A. B. lately in [*insert the style of the court*] by the judgment of the said court, recovered against the said C. D. for his damages, which he had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said C. D. to the said A. B., as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record, and which judgment was afterwards, on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by virtue of an order of our said court before us at Westminster, [*or of —, one of the justices of the said court before us at Westminster, as the case may be*], in pursuance of the statute in such case made and provided; and the costs attendant upon the application for the said order, and upon the said removal, were, on the — day of —, in the year of our Lord —, taxed and allowed by our said court before us at Westminster at the sum of £——. And we further command you, that of the said goods and chattels of the said C. D. in your bailiwick, you further cause to be made the said sum of £——. [*The costs attendant upon the removal of the judgment out of the inferior court into the court of Q. B.*] together with interest on the said two several sums of £—— and £——, at the rate of four pounds *per centum* per annum, from the said — day of —, in the year of our Lord —, (*the day on which the costs*

f removal were taxed;) and that you have that money, with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for his damages aforesaid, and for costs and interest as aforesaid; and that you do all such things as by the statute, passed in the second year of our reign, you are authorised and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, and have there then his writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

[*Ante*, p. 102.]

No. XI.

Writ of fieri facias on an order for payment of money, made in an inferior court, and removed into the court of Q. B.

Victoria, &c., to the Sheriff of —, greeting. We command you that of the goods and chattels of C. D. in your bailiwick, you cause to be made £—, which lately in [*insert the style of the court*], by a rule of the said court, entitled, &c. [*as the case may be*], were by the said court ordered to be paid by the said C. D. to A. B., and which rule was afterwards, on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by virtue of an order of our said court before us at Westminster [*or of —, one of the Justices of our said court before us at Westminster, as the case may be*], in pursuance of the statute in that case made and provided; and the costs attendant upon the application for the said last-mentioned order, and upon the said removal, were, on the — day of — in the year of our Lord —, taxed and allowed by our said court before us at Westminster, at the sum of £—. And we further command you, that of the said goods and chattels of the said C. D. in your bailiwick, you further cause to be made the said sum of £—, [*the costs of removing the rule of the inferior court into the court of Q. B.*], together with interest on the said two several sums of £— and £—, at the rate of four pounds *per centum* per annum, from the said — day of —, [*the day on which the costs of removing the rule of the inferior court into the court of Q. B. were taxed*]; and that you have that money, with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for the said monies by the said rule first above mentioned ordered to be paid by the said C. D. to the said A. B., and for costs and interest as aforesaid; and that you do all such things as by the statute passed

in the second year of our reign, you are authorised and required to do in this behalf. And in what manner you shall have executed this our writ, make appear to us at Westminster immediately after the execution thereof, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

[*Ante*, p. 102.]

No. XII.

Writ of fieri facias on an order for payment of money and costs, made in an inferior court, and removed into the court of Q. B.

Victoria, &c., to the Sheriff of —, greeting. We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made £ —, which lately in [*insert the style of the court*], by a rule of the said court entitled, &c. [*as the case may be*] were by the said court ordered to be paid by the said C. D. to A. B., and also £ — for the costs of the said rule by the said court also ordered to be paid by the said C. D. to the said A. B., which said rule was afterwards, on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by an order of our said court before us at Westminster, [*or of —, one of the Justices of our said court before us at Westminster, as the case may be*] in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the last mentioned order, and upon the said removal, were, on the — day of —, in the year of our Lord —, taxed and allowed by our said court before us at Westminster at the sum of £ —; and we further command you that of the said goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £ —, [*the costs of removing the rule from the inferior court into the court of Q. B.*], together with the interest on the said three several sums of £ —, and £ —, and £ —, at the rate of four pounds *per centum* per annum, from the said — day of —, in the year of our Lord —, [*the day on which the costs of removing the rule from the inferior court into the court of Q. B. were taxed*]; and that you have that money, with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for the monies by the said rule first above mentioned ordered to be paid by the said C. D. to the said A. B. and for costs and interest as aforesaid; and that you do all such things as by the statute passed in the second year of our reign you are authorised and required to do in his behalf; and in what manner you shall have executed this our writ,

ear to us at Westminster immediately after the execution, and have there then this writ.
 1, Thomas Lord Denman, at Westminster, on the
 of —, in the year of our Lord —.
 [*Ante*, p. 102.]

Writ of ca. sa.

1, by the Grace of God, of the United Kingdom of
 ain and Ireland, Queen, Defender of the Faith, To
 f of —, Greeting. We command you that you take
 shall be found in your bailiwick, and him safely keep
 u may have his body before [us at Westminster, or
 before our Justices"] at Westminster immediately
 execution hereof, to satisfy J. S. the sum of £ —,
 said J. S. lately in our court before us at Westminster
 red against the said J. N. for his damages, which he
 ned, as well on occasion of the not performing certain
 nd undertakings then lately made by the said J. N.
 l J. S., as for his costs and charges by him about his
 : behalf expended, whereof the said J. N. is convicted,
 to us of record, together with interest upon the said
 —, at the rate of £4 per cent. per annum from the
 of — in the year of our Lord 184—, on which day
 ent aforesaid was entered up. And have there then
 Witness — at Westminster on the — day
 the year of our Lord 1844.

Satisfaction piece.

Queen's Bench.
 n in the seventh year of the reign of Queen Vic-

Queen's Bench.
 to wit: Satisfaction is acknowledged between John
 ntiff, and Joseph Styles, defendant, in a plea of [debt
 and £ — damages and costs, or "trespass on the
 promises for £ — damages and costs."]
 nt entered of Hilary term, 7 Vict. Roll 492.

C. D. attorney,
 16th February, 1844.

[*Ante*, p. 112.]

WRIT OF ERROR.

Præcipe.

Surrey, to wit: Writ of error for Joseph Styles, late of —, maltster, at the suit of John Nokes, on a judgment in trespass [*or as the cause of action may be*] in the Queen's Bench, returnable on the — day of —. C. D. defendant's attorney, 2 March 184—.

[*Ante*, p. 136.]

Common joinder in error.

In the Queen's Bench.

John Nokes } And hereupon afterwards, that is to say, on
ats. } — in — term, in the year —, the
Joseph Styles. } said John Nokes, by A. B. his attorney, comes into court here, and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays that the Justices [*and Baron of the Exchequer*] of our lady the Queen in the Exchequer chamber, now here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment aforesaid in manner aforesaid given, may in all things be affirmed, &c. But because the said Justices [*and Barons*] of our said lady the Queen now here are not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid until —, before our said lady the Queen, wheresoever she shall then be in England, to hear their judgment thereupon, for that the said court of our said lady the Queen here are not yet advised thereof, &c.

[*Ante*, p. 144.]

EJECTMENT.

Notice to quit.

Sir,—I hereby [as agent for Mr. John Nokes your landlord, and on his behalf] give you notice to quit and deliver up possession of the [house, lands, and premises, with the appurtenances] situate at — in the county of — which you hold [of him] as tenant thereof, on the [twenty-fifth day of March next], or at the expiration of the current year of your tenancy, which shall expire next after the end of one half year from the date of this notice. Dated the — day of — 1844.

James Nokes.

To Mr. Joseph Styles.

[*Ante*, p. 148.]

*Ejectment in ordinary cases.**Affidavit of service of declaration.*

In the, &c.

Between John Doe, on the several demises

of A. B. & C. D., plaintiff,

and

Richard Roe, defendant.

J. B., clerk to E. F. of —, gentleman, attorney for the lessors of the plaintiff in this cause, maketh oath and saith, that he did, on the — day of — instant, [personally] serve Joseph Styles, tenant in possession of [part of] the premises, mentioned in the declaration of ejectment hereunto annexed, with a true copy of the said declaration, and of the notice there under written [*if the service were upon the wife*, "by delivering the same to the wife of the said Joseph Styles upon the premises aforesaid," or "at the dwelling house and place of residence of the said Joseph Styles, situate in —, &c;"] and this deponent at the same time read over to ["the said wife of"] the said Joseph Styles the said notice, and explained to [her or him] the intent and meaning of the said declaration and notice, and of the service thereof.

[*Ante*, p. 156.]

Plea general issue.

In the Queen's Bench or Common Pleas.

The — day of — A.D. 1844.

Joseph Styles,	} And the said Joseph Styles, by C. D. his attorney, comes and defends the force and in-
ats.	
John Doe,	
on demise of	
John Nokes.	} jury when, &c., and says that he is not guilty of the said supposed trespass and ejectment [or trespasses and ejectments] above laid to his charge or of any part thereof, in manner and form as the said John Doe hath above thereof complained against him; and of this he the said Joseph Styles puts himself upon the country, &c.

* * * To be engrossed on plain paper, and the consent rule (and if the landlord defend, the rule for that purpose also) annexed to it. See *ante*, p. 165.

[*Ante*, p. 165.]

Writ of habere facias possessionem, upon a single demise.

Victoria, &c., to the Sheriff of [Yorkshire], greeting: Whereas John Doe lately in our court [before us, or in C. B. "before our justices"] at Westminster, by the consideration and judg-

ment of the same court, recovered against Joseph Styles his term yet to come of and in [four messuages, four gardens, and four acres of land, *as in the declaration,*] with the appurtenances, situate in the parish of —, in your bailiwick, which John Nokes had, on, [*the day of the demise in the declaration*] demised to the said John Doe, for a term which is not yet expired, to hold the same from [*the day before the date of the demise*] to the full end and term of five years from thence next following, and fully to be complete and ended: by virtue of which said demise the said John Doe entered into the said tenements with the appurtenances, and was thereof possessed, until the said Joseph Styles afterwards on [*the day of the ouster, as laid in the declaration*], with force and arms, &c. entered into the said tenements with the appurtenances, which the said John Nokes had so demised to the said John Doe for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm; whereof the said Joseph Styles is convicted, as appears to us of record. Therefore we command you that without delay you cause the said John Doe to have possession of his said term yet to come of and in the tenements aforesaid with the appurtenances, and in what manner you shall have executed this our writ, make appear [to us on —, wheresoever we shall then be in England, or in C.B. "to our justices at Westminster, on —"] and have you there then this writ. Witness —, at Westminster, the — day of —, in the — year of our reign.

[*See ante*, p. 171.]

* * * *When this writ is sued out upon a judgment against the casual ejector, substitute the name "Richard Roe," for "Joseph Styles," where it occurs. So if a moiety only be recovered, the necessary alterations in the above form may be made from the judgment.*

Proceedings in ejectment, on a vacant possession.

1. *Letter of attorney, to enter, &c.*

Know all men by these presents, that I, John Nokes, of —, gentleman, have made, ordained, constituted, and appointed and by these presents do make, ordain, constitute, and appoint, James Wells, of —, gentlemen, to be my true and lawful attorney, for me and in my name, to enter into and take possession of a certain messuage, late in the tenure and occupation of J. L. situate in the parish of —, in the county of [York], but now untenanted; and after the said James Wells shall have taken possession thereof, for me and in my name, and as my act and deed, to sign seal, and execute a lease of the said premises, with the appurtenances, to Samuel Wells of —, gentleman, to have and to hold the same to the said Samuel Wells, his exe-

administrators, and assigns, from [the 25th day of last past, to the full end and term of five years from next following, and fully to be complete and ended, at a yearly rent of one pepper corn, if the same shall be properly paid; subject nevertheless to a proviso to make void the same in payment or tender by me, my executors, administrators, or assigns, of the sum of six pence, to the said Samuel Wells, his executors, administrators, or assigns. In witness whereof I have hereunto set my hand and seal, this — day of — A. D. 1844,

John Nokes (L.S.)

and delivered in my presence, }
first duly stamped, A. B. }
[Ante, p. 172.]

2. Lease.

Indenture, made the — day of —, in the year of our Lord 18—, between John Nokes of —, gentleman, of the one part, and Samuel Wells, of —, gentleman, of the other part, witnesseth, that the said John Nokes, for and in consideration of the sum of five shillings, of lawful money of Great Britain, to him in hand paid by the said Samuel Wells at or about the sealing and delivery of these presents, the receipt of the said John Nokes doth hereby acknowledge, hath granted, and to farm let, and by these presents doth grant, and to farm let, unto the said Samuel Wells, his executors, administrators, and assigns, all that [messuage, garden, out-offices, and premises] with the appurtenances, and being in —, in the county of [York,] late in the possession and occupation of J. L., but now untenanted; to have and to hold the said [messuage, yard, garden, out-offices, and premises,] with the appurtenances, from the [as in the last part of the] last past, for and during, and to the full end and term of five years from thence next following, and fully to be complete and ended, yielding and paying therefore, yearly on every year, during the said term, to the said John Nokes, his executors, administrators, or assigns, the rent of one pepper corn, on the — in each and every year, if the same shall be demanded. Provided always that if the said John Nokes, his executors, administrators, or assigns, shall at any time hereafter tender or pay, or cause to be tendered or paid, unto the said Samuel Wells, his executors, administrators, or assigns, the sum of sixpence, that then this indenture shall be void of no effect, any thing herein contained to the contrary notwithstanding. In witness whereof the parties hereto have interchangeably set their hands and seals, at and year first above written.

Sealed and delivered as the act and deed } For John Nokes,
of John Nokes, by James Wells, of ——— } (by power of at-
gentleman, by virtue of a letter of attorney, } torney in this be-
to him for that purpose made by the said } half.)
John Nokes, bearing date the ——— day of } Jas. Wells (L.S.)
—— instant, (being first duly stamped,) } Sm. Wells (L.S.)
in the presence of } A. B. }

[*Ante*, p. 172.]

3. *Declaration upon a single demise.*

In the Queen's Bench, or Common Pleas.

The ——— day of ——— A.D. 1844.
Yorkshire to wit: ———, late of ———, yeoman, was attached
to answer [lessee,] of a plea, wherefore with force and
arms, &c. he entered into [four messuages, four gardens, and
four acres of land] with the appurtenances, situate in the parish
of ———, in the county aforesaid, which ——— had demised
to the said ——— for a term which is not yet expired, and
ejected him from his said farm, and other wrongs to him
there did; to the great damage of the said ———, and against
the peace of our lady the Queen, &c. And thereupon
the said ——— by A. B. his attorney, complains, that whereas
the said ——— on [*some day after the lessor's title or right
of entry accrued*] in the sixth year of the reign of our sovereign
lady Queen Victoria, in the parish aforesaid in the county
aforesaid, had demised to the said ——— the tenements afore-
said with the appurtenances, to have and to hold the same
to the said ——— and his assigns, from [*the day before
the date of the demise above mentioned,*] in the same year
aforesaid, to the full end and term of five years from thence next
following, and fully to be complete and ended; by virtue of
which said demise the said ——— entered into the said tene-
ments with the appurtenances, and was thereof possessed, for
the term so thereof granted as aforesaid. And the said ———
being so possessed thereof, the said ——— afterwards, to wit,
on [*some day after the date of the above demise*] in the
year last aforesaid, with force and arms, &c. entered into
the said tenements with the appurtenances, which the said
—— had so demised to the said ——— for the term aforesaid,
which is not yet expired, and ejected the said ——— from his
said farm, and other wrongs to him then and there did, to the
great damage of the said ——— and against the peace of our
said lady the Queen. Wherefore the said ——— saith that he is
injured and hath sustained damage to the value of twenty
pounds; and therefore he brings his suit, &c.

"Mr. ———. Take notice that unless you appear within the
first four days of the next ——— term, in Her Majesty's court

of — at Westminster, at the suit of the above named plaintiff —, and plead to his declaration in ejectment, judgment will thereupon be entered against you by default. Your's, &c. A. B., plaintiff's attorney."

Ejectment by landlord against tenant.

Notice at the foot of the declaration.

Mr. Joseph Styles [*the tenant.*]

Take notice that you are hereby required to appear in Her Majesty's court of — at Westminster, on the first day of next — term, then and there to be made defendant in this action of ejectment, and then and there to enter into a recognizance by yourself and two sufficient sureties, in such sum as to the said court shall seem reasonable, conditioned to pay the costs and damages which shall be recovered in this action, if the Court shall so order.

Your's &c.,

John Nokes [landlord.]

[*Ante*, p. 172.]

Affidavit for rule for bail.

In the [Queen's Bench.]

Between John Doe on the demise of John Nokes, Plaintiff,
and

Richard Roe, Defendant.

John Nokes of —, gentleman, the lessor of the plaintiff above named, and A. B. of —, gentleman, attorney for the said lessor of the plaintiff, and J. B. clerk to the said A. B., severally make oath and say: And first this deponent John Nokes for himself saith, that this action is brought for the recovery of a [dwelling house, outhouses, farm, and premises with the appurtenances,] situate in the parish of —, in the county of —, formerly held and occupied by Joseph Styles, as tenant thereof to this deponent, under and by virtue of a certain indenture of lease, hereunto annexed, for a certain term which expired on the — day of — last; and that the said Joseph Styles has been possessed of and enjoyed the said [dwelling house, outhouses, farm, and premises, with the appurtenances] under and by virtue of the said lease, from the commencement of the term therein mentioned, until the expiration thereof as aforesaid, and hath continued from thence hitherto to hold and occupy, and still doth hold and occupy the same. [or if he underlet the premises, and the undertenant be in possession of them, state it accordingly.] And this other deponent A. B. for himself saith, that on or about the — day of — in the year of our Lord 18 —, this deponent was present and did see the said Joseph Styles duly sign, seal, deliver and execute

the lease hereunto annexed, and that the name Joseph Styles thereunto subscribed as party thereto, is of the handwriting of the said Joseph Styles, and that the name A. B. thereunto subscribed as witness of the execution thereof, is of the proper handwriting of this deponent. And this other deponent J. B. for himself saith, that he did, on the — day of — instant, serve the said Joseph Styles with a demand in writing of the possession of the premises in question, by leaving the same for him with a servant of the said Joseph Styles at his dwelling house and usual place of abode situate in —; which said demand was directed to Mr. Joseph Styles, and was in words and terms following: "Sir, I hereby" [*&c. as in the written demand,*] and signed "James Nokes." And this deponent John Nokes further saith, that he caused the said Joseph Styles to be served with the said demand in writing as aforesaid, in order that he this deponent might obtain possession of the premises aforesaid; but although this deponent hath since made several applications to the said Joseph Styles for possession of the same, yet the said premises have not nor hath any part thereof been delivered up to this deponent or to any person on his behalf. And this deponent J. B. further saith that he did on" [*&c. stating a service of the declaration and notice, as in the form ante, p. 343 to the end.*]

The above named deponents,
John Nokes, A. B. and J. B.
were sworn, [*&c. as in the*
Jurat post p. 360.

John Nokes.
A. B.
J. B.

[*Ante, p. 177.*]

REPLEVIN.

Præcipe for the recordari facias loquelam.

Middlesex to wit: Re. Fa. Lo. for [John Nokes or Joseph Styles] of a plaint between Joseph Styles and John Nokes, for taking and unjustly detaining the [cattle] goods and chattels of the said Joseph Styles. [Returnable before our lady the Queen on — or in C. B. "Returnable before her Majesty's Justices at Westminster on —."]

The next county court day	} A. B. attorney,
will be on the — day	
of — next.	

— 18—

. To be written on plain paper, and left with the cursitor.

Writ of recordari facias loquelam, for plaintiff.

Victoria, &c., to the sheriff of [Middlesex] greeting: We command you that, in your full county court, you cause the plaint to be recorded, which is in the same county, without our

writ, between Joseph Styles and John Nokes, of the [cattle] goods and chattels of the said Joseph Styles taken and unjustly detained, as it is said; and that you have the said record [before us on ——— wheresoever we shall then be in England, or in C. B. "before our Justices at Westminster on the morrow of the Holy Trinity]"; under your seal and the seals of four lawful knights of the same county, of such as shall be present at the said record; and that you prefix the same day to the parties, that they may then be there ready to proceed in the said plaint, as shall be just; and have you there the names of the said four knights, and this writ. Witness ourself at Westminster, the ——— day of ——— in the ——— year of our reign.

Let this writ be executed if the said Joseph Styles require it; otherwise not.

. *Given to you by the cursitor, upon your furnishing him with the above præcipe.*

[*Ante* p. 183.]

ACTIONS AGAINST CLERGYMEN.

Sheriff's return to a fieri facias.

The within named Joseph Styles has no goods or chattels, nor any lay fee, in my bailiwick, whereof I can cause to be made the [debt and] damages within mentioned, or any part thereof, as within I am commanded; but I hereby certify that the said Joseph Styles is a beneficed clerk, that is to say, [rector of the rectory and parish church of ———, or as the case may be] in my county; which said [rectory and parish church] are within the diocese of the Reverend Father in God, [John] by divine Providence, Lord Bishop of ———

The answer of R. S. sheriff.

[*Ante* p. 195.]

Fieri facias de bonis ecclesiasticis.

Victoria, &c., to the Reverend Father in God [John] by divine providence, Lord Bishop of ———, greeting: We command you that you cause to be levied of the ecclesiastical goods in your diocese, of Joseph Styles, clerk, [as well a certain debt, &c.; or "the sum of," &c. as in ordinary cases, to the words] "to render unto the said John Nokes for his [debt and] damages aforesaid: for that our sheriff of ——— returned [to us," or in C. B. "to our Justices] at Westminster, at a certain day now past, that the said Joseph Styles had no goods or

chattels, nor any lay fee in his bailiwick, whereof he could cause to be made the [debt and] damages aforesaid, or any part thereof: and at the same time certified to us that the said Joseph Styles was a beneficed clerk, that is to say, rector of the rectory and parish church of ——— in his county, and which said rectory and parish church were within your diocese: and have you there then, [or in Q. B. by original or in C. B. omit the word "then"] this writ. Witness——, at Westminster, the ——— day of ———, in the ——— year of our reign.
[*Ante* p. 195.]

ACTIONS BY INFANTS.

1. *Petition to sue by prochein amy, in B. R. or C. B.*

In the Queen's Bench, or Common Pleas.

Between John Nokes, plaintiff,
and

Joseph Styles, defendant.

To the Right Honourable [Thomas, Lord Denman, Lord Chief Justice of England, or "Sir ———, Knight, Lord Chief Justice of her Majesty's court of the Bench at Westminster."]]

The humble petition of John Nokes, the plaintiff in this suit, an infant under the age of twenty one years,

Sheweth:

That your petitioner has, as he is advised, a good cause of action against the said Joseph Styles, for [the amount of goods sold and delivered by your petitioner to the said Joseph Styles, and at his request, or as the cause of action may be, describing it as in an affidavit to hold to bail, *ante*, vol. 1, p. 421, &c.]; and that your petitioner has lately commenced an action against the said Joseph Styles, in this honourable court, for the same: But in regard to your petitioner being an infant under the age of twenty-one years, to wit, of the age of ——— years,

Your petitioner therefore humbly prays your Lordship to admit him to prosecute the said action by William Nokes, of ———, merchant, your petitioner's next friend.

And your petitioner will ever pray.

John Nokes.

Prochein amy's consent thereto.

I hereby consent and agree that the above named John Nokes shall be at liberty to prosecute this action by me, as his next friend, according to the prayer of the above petition.

William Nokes.

. To be written at the foot of the petition, and signed by the prochein amy. See *ante*, p 205.

2. *Affidavit of signing the same.*

In the Queen's Bench, or Common Pleas.

Between John Nokes, Plaintiff,

and

Joseph Styles, Defendant.

J. B. clerk to A. B. of —, gentleman, attorney for the abovenamed plaintiff, maketh oath and saith, that he, this deponent, on —, was present, and did see John Nokes, the abovenamed plaintiff, sign the petition hereunto annexed, and at the same time did see William Nokes, the person mentioned in the prayer of the said petition, sign the consent thereunder written.

J. B.

Sworn [*&c. see ante*, p. 270, 272.

3. *Judge's fiat for a rule thereon.*

John Nokes }
against } Upon reading the petition of John Nokes,
Joseph Styles, } the consent of William Nokes, thereunder
written, and the affidavit of J. B. I do order
that the [clerk of the rules, or "Prothonotary"] do draw up a
rule that William Nokes be admitted to prosecute for John
Nokes (who is an infant under the age of twenty-one years)
against Joseph Styles, a certain action of trespass on the case
upon promises, [*or as the form of action may be*] in the court
of our lady the Queen [before the Queen herself; or "of the
Bench,"] as the next friend of the said John Nokes, during his
minority. Dated the — day of —, 18—.

J. P.

[*See ante*, p. 205.]

ACTIONS AGAINST INFANTS.

1. *Petition to defend by guardian, in B. R. or C. B.*

Commencement, same as the petition ante, p. 350] sheweth :

That the above-named plaintiff hath lately commenced an action in this honourable court against your petitioner, for, [*here state the cause of action shortly, as in the form ante* p. 350,] and your petitioner is advised and believes, that he has a good defence thereto : but in regard to your petitioner being an infant under the age of twenty-one years, to wit, of the age of — years,

Your petitioner therefore humbly prays your lordship to assign to him George Styles of —, merchant, as his guardian to defend the said suit.

And your petitioner will ever pray.

Joseph Styles.

Guardian's consent thereto.

I hereby consent and agree that the above-named Joseph Styles shall be at liberty to defend this action by me, as his guardian, according to the prayer of the above petition.

George Styles.

. To be written at the foot of the petition, and signed by the guardian.

Affidavits of signing the same.

Same as the form *ante*, p. 351.

ACTIONS AGAINST JUSTICES OF PEACE.

Notice of action.

To Joseph Styles, esquire, one of Her Majesty's Justices of Peace in and for the county of —.

*Take notice that I intend, at the expiration of one calendar month from the day of your being served with this notice, or as soon after as conveniently may be, to cause a writ of our Lady the Queen, called a writ of summons, to be sued out of Her Majesty's court of [Queen's Bench, or Common Pleas] against you, at my suit, in a plea of trespass, for that you, as one of her Majesty's Justices of the Peace, on or about the — day of —, 18—, caused, [*here state the cause of action 'clearly and explicitly'*]. Dated the — day of —, 18—.

John Nokes, of —, maltster.

. To be written on plain paper, and indorsed, "A. B. of —, attorney for the within named John Nokes."

[*Ante*, p. 212.]

Demand of copy of warrant from a constable.

To Mr. C. L.

Whereas, on or about the — day of —, 18—, you apprehended, assaulted, and imprisoned, John Nokes, of —, maltster, or as the case may have been] under colour or pretence of some warrant or warrants of some justice or justices of the peace, authorizing you so to do; now I do hereby, as

the attorney for the said John Nokes and on his behalf, demand of you the perusal and copy of all and every warrant and warrants under and by virtue of which you [apprehended and imprisoned the said John Nokes, *or as the cause of action may be, stating it shortly*] as aforesaid. Dated the — day of —, 18—.

A. B. of —, attorney for
the said John Nokes.

[*Ante*, p. 215.]

ACTION BY PAUPER.

Petition to be admitted to sue in formâ pauperis.

In the Queen's Bench, *or* Common Pleas.

To the Right Honourable Thomas Lord Denman, Lord Chief Justice of England, *or* "Sir N. C. Tyndal, Knight, Lord Chief Justice of her Majesty's court of the bench at Westminster":

The humble petition of John Nokes, of —, carpenter,
Sheweth:

That Joseph Styles is indebted unto your petitioner in the sum of £— for work and labour done and performed by your petitioner for the said Joseph Styles and at his request, [*or as the cause of action may be, stating it as in an affidavit to hold to bail; see ante*, vol. 1, 421;] "and that your petitioner hath not as yet commenced any action against him for the same, being unable to carry on such cause, by reason of your petitioner's extreme poverty, as appears by the affidavit hereunto annexed.

Your petitioner therefore humbly prays your Lordship, that he may be admitted to prosecute his said action *in formâ pauperis*; and that J. G. may be assigned to him as his counsel, and A. B. as his attorney, to prosecute the same.

And your petitioner will ever pray.

John Nokes.

. *To be engrossed on paper, and signed by the pauper.*

[*Ante*, p. 216.]

Certificate of counsel.

I humbly conceive that the said John Nokes has a good cause of action against the abovenamed Joseph Styles, and consent to be his counsel.

J. G.

. *To be written in the margin of the petition, opposite the prayer. See ante*, p. 216.

Affidavit of the plaintiff's poverty.

In the Queen's Bench, or Common Pleas.

John Nokes, of —, carpenter, maketh oath and saith, that he is not worth five pounds in the world, save and except his wearing apparel, and the matter in question mentioned in the petition hercunto annexed.

Sworn, &c.

John Nokes.

[*Ante*, p. 216.]

PROCEEDINGS AGAINST PRISONERS.

Declaration.

In the [&c.]

The — day of — A. D. 18 —. [*Venue*] John Nokes by E. F. his attorney [*or in his own proper person,*] complains of Joseph Styles, being detained at the suit of John Nokes in the custody of the Sheriff, [*or the keeper of the Queen's prison:* For that whereas, &c., *as in ordinary cases.*

[*Ante*, p. 221.]

Writ of detainer.

Victoria, [&c.] To the Keeper of our Prison. We command you that you detain C. D. if he shall be found in your custody at the delivery hereof to you, and him safely keep in an action on promises [*or of debt, &c. as the case may be*], at the suit of A. B. until he shall be lawfully discharged from your custody. And we do further command you, that on receipt hereof, you do warn the said C. D. by serving a copy hereof on him, that within eight days after service of such copy, inclusive of the day of such service, he do cause special bail to be put in for him in our Court of — to the said action; and that in default of his so doing, the said A. B. may declare against him before the end of the term next after his detainer, and proceed thereon to judgment and execution. And we do further command you the said keeper, that immediately after the service hereof you do return this our writ or a copy hereof, to our said Court, together with the day of the service hereof.

Witness — at Westminster, the — day of —.

N.B. This Writ is to be indorsed in the same manner as the writ of Capias,* but not to contain the warning on that writ. 2 *W.* 4, c. 39. *Sch. No. 5.*

[*Ante*, p. 219.]

* Vol. 1, p. 155.

Committitur piece.

Middlesex, to wit: C. D. is committed to the custody of the keeper of the Queen's prison, at the suit of A. B. in a plea of [debt for — pounds, and — pounds damages, or in *assumpsit*, "trespass on the case upon promises, for — pounds damages"], there to remain until, &c.

E. F. attorney.

Judgment of Trinity term, 7 Vict.
Roll 576.

* * * *To be engrossed on a piece of unstamped parchment, and filed with the Clerk of the Judgments.*
[*Ante*, p. 227.]

Entry of committitur.

The form of the entry may be seen in the book, kept in the office of the clerk of the judgments.

Writ of supersedeas for not declaring.

Victoria, &c. to the sheriff of—, greeting: Whereas Joseph Styles is detained in our prison under your custody, by virtue of [a writ of *capias* or *detainer*,] returnable before us at Westminster on [the return day] to answer John Nokes in an action against the said Joseph Styles for fifty pounds upon promises, [stating the cause of action thus shortly;] and because the said John Nokes hath not declared against the said Joseph Styles, within two terms after the return of the said writ, as required by the rules of our court before us, and he said Joseph Styles hath come into our said court before us, and appeared at the suit of the said John Nokes, in the plea aforesaid: Therefore we command you, that if the said Joseph Styles be detained in our prison, under your custody, by virtue of the said writ, and for no other cause, then do you immediately discharge the said Joseph Styles out of your custody, and permit him to go at large, as you will answer the contrary at your peril. Witness Thomas Lord Denman,

at Westminster, the — day of —, in the — year of our reign.

. To be engrossed on parchment, signed by the signer of the writs, and sealed.

[*Ante*, p. 231.]

2. *Habeas corpus, to bring the principal up, if in custody.*

Victoria, &c. to [the Sheriff of —, or other officer in whose custody the party may be, see *ante*, Vol. 1, p. 151.] greeting: We command you that you have the body of Joseph Styles, detained in our prison under your custody as it is said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name he may be called or known, before our right trusty and well beloved Thomas Lord Denman, our Chief Justice assigned to hold Pleas in our court before us, [*or in C. B.* "before our right trusty and well beloved Sir Nicholas Conyngham Tindal, Knight, our Chief Justice of the Bench,"] at his chambers in Rolls Buildings, Chancery-lane, London, immediately after the receipt of this writ, to do and receive all and singular those things which our said Chief Justice shall then and there consider of him in this behalf; and have there then this writ. Witness — at Westminster, the — day of —, in the — year of our reign.

C. D. attorney.

[*Ante*, p. 231.]

6. *Writ of habeas corpus ad satisfaciendum.*

Victoria, &c. to the keeper of our prison — greeting: We command you that you have before our justices at Westminster, on [a day certain] the body of Joseph Styles, detained in our prison, under your custody, as we are informed, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name he may be called in the same, to satisfy John Nokes, [as well a certain debt, &c. as in the *ca. sa. ante*, p. 135; *or in covenant, assumpsit, &c.* "the sum of —, which, in our court before our justices at Westminster, were awarded to the said John Nokes, for," &c. as in the forms of *ca. sa. ante*, p. 138, &c. to the words,] whereof the said Joseph Styles is convicted;

and further to do and receive what our said justices shall then and there consider of him in this behalf: and have you then there this writ. Witness, — at Westminster, the — day of —, in the — year of our reign.

. To be signed by the Master, judge's fiat obtained thereon, and sealed; and then to be left with the Clerk of the Papers at the Queen's Bench Prison.

[*Ante*, p. 233.]

ARBITRATION.

Bond of submission.

Know all men by these presents, that I, Joseph Styles, of —, maltster, am held and firmly bound to John Nokes, of —, grocer, in £—, of good and lawful money of Great Britain, to be paid to the said John Nokes, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the — day of —, in the fifth year of the reign of our sovereign Lady Victoria, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, and in the year of our Lord 18—.

Whereas certain differences have arisen between the said John Nokes and the said Joseph Styles respecting [certain matters of account now open and unsettled between them,] and it is agreed by and between the said John Nokes and the said Joseph Styles to refer to A. B. and C. D. as arbitrators, [as well the said differences, as also all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, both at law and in equity, at any time or times heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by and between the said parties], with liberty to the said arbitrators, [either before they enter upon the said arbitration, or] at any time pending the said reference, to appoint, choose, and name an umpire, and to make and publish their award or umpirage therein, notwithstanding the happening of my death or the death of the said John Nokes before the same shall be so made and published: Now the condition of this obligation is such, that if the above bounden Joseph Styles, his heirs, executors, or administrators, do and shall, upon his or their part and behalf, in all things well and truly stand to, obey, abide, observe, perform, fulfil and keep the award, order, arbitrament, final end and determination of the said arbitrators,

so as the said award be made in writing on or before the — day of —, now next ensuing; or if the said arbitrators do not make such their award by the time aforesaid, then if the said Joseph Styles, his heirs, executors, or administrators, do and shall, upon his or their part and behalf, in all things well and truly stand to, obey, abide, observe, perform, fulfil and keep the award, order, arbitrament, umpirage, final end and determination of the person so by the said arbitrators to be appointed, chosen, and named as umpire, as aforesaid, so as the said umpire do make his said award and umpirage in writing, on or before the — day of —, now next ensuing: then this obligation to be void; otherwise to remain in full force and virtue. And the said Joseph Styles doth hereby agree that this his submission to the award and umpirage aforesaid shall be made a rule of her Majesty's Court of [Queen's Bench, or "Common Pleas," or "Exchequer of Pleas,"] at Westminster, pursuant to the statute in such case made and provided.

Joseph Styles (L.S.)

Sealed and delivered (being first
duly stamped,) in the presence of
J. R. }

The award.

To all to whom these presents shall come, I, A. C. esquire, of Lincoln's Inn, barrister at law, send greeting: Whereas on [reciting the bond, rule, or order, &c. in the past tense, as for instance:] "Saturday next, after the morrow of the Holy Trinity, in the — year of the reign of our sovereign Lady Queen Victoria, in a certain cause then depending in the court of our Lady the Queen before the Queen herself, in which John Nokes was plaintiff and Joseph Styles was the defendant, in a plea of trespass on the case upon promises, upon hearing Mr. —, of counsel for the defendant, and Mr. —, of counsel for the plaintiff, and by their consent, it was ordered in the words following, that is to say: It is ordered" [as in the rule, &c. to the end.] "And whereas, on the motion of Mr. —, afterwards on Wednesday next after three weeks of the Holy Trinity, in the — year of the reign of our said Lady the Queen, it was further ordered by the said court in the said cause, in the words following: Upon reading the rule on Saturday next after the morrow of the Holy Trinity in Trinity term last past, it is ordered, that the time limited for the arbitrator making his award between the parties be enlarged until the second day, inclusive, of the next term. And whereas, on the motion of Mr. — afterwards on Monday next after the morrow of —, in the — year of the reign of our said Lady the Queen, it was further

ordered by the said court, in the said cause, in the words following : Upon reading the rule made in —, it is ordered, that the time limited for the arbitrator making his award between the parties, be further enlarged until the last day, inclusive, of this same term. Now know ye, that I, the said A. C., having taken upon myself the burden of the said reference, and having heard, examined, and considered the allegations, witnesses, and evidences of both the said parties, do hereby award, order, and finally determine the said cause in favour of the said plaintiff : And I do hereby find and award, that [the sum of ninety pounds was and still remains due from the said defendant to the said plaintiff : And I do further award and direct, that the said defendant do, upon demand, pay to the said plaintiff, or his attorney, the said sum of ninety pounds, together with the costs of this action, to be taxed by the Master, and that the said cause be no further proceeded in : And I do further award and direct, that each of the said parties do pay and bear their own costs of this reference ; and that the said plaintiff do pay the expenses of this my award, and that the said defendant do, upon demand, repay to the said plaintiff or to his attorney one moiety thereof.

Signed and published by the within-named	} A. C.	
A. C. this — day of —, 18—, as		
his award, (being first duly stamped,) in		
the presence of		
	B. E.	

AFFIDAVITS.

In the Queen's Bench, [or "Common Pleas," or "Exchequer of Pleas."]

Between John Nokes, plaintiff,
and

Joseph Styles, executor of the last
will and testament of John Styles,
deceased, defendant.

Joseph Styles, of Russell Square, in the county of Middlesex, merchant, the above-named defendant, Henry Smith, of Furnival's Inn, Holborn, in the County of Middlesex, gentleman, attorney for the said defendant, George Dunn, clerk to the said Henry Smith, and James Fraser, clerk to Thomas Andrews, of Serjeants' Inn, Fleet-street, in the city of London, attorney at law, severally make oath and say : And first, "this deponent, Joseph Styles, for himself, saith that," [&c.] ; "And this leponent further saith that," [&c.] "And this other deponent, Henry Smith, for himself, saith that," [&c.] "And this deponent, George Dunn, for himself, saith that, [&c.] "And this leponent, James Fraser, for himself, saith that, [&c.] "And his deponent, Joseph Styles, for himself, further saith that,"

[&c.] "And these several deponents, Joseph Styles, Henry Smith, George Dunn, and James Fraser, further say that,"
[&c.]

Sworn [*if in court*] in court the
— day of —, 18

J. S.

H. S.

or Sworn [*if before a judge*] at
my chambers in Serjeant's Inn, Chan-
cery Lane, this — day of —, 18 ,
before me

G. D.

J. F.

or, Sworn [*if before a commis-
sioner*] at — in the county of —,
this — day of —, 18 , before me,

L. M.

a commissioner of the
said court of Queen's Bench [C. P. or
E. of P.]

or, "affirmed" [*instead of "sworn"*
as above, if the party be a Quaker.]

If sworn by two or more persons, the jurat must be thus :]
The above-named deponents, Joseph Styles, Henry Smith,
George Dunn, and James Fraser, were severally sworn [*&c. as
above.*]

[*Ante*, p. 271.]

APPENDIX II.

The following questions of practice, will aid the younger members of the profession in detecting errors in the proceedings of their adversaries, and will at once indicate the mode of making advantage of such errors.

NEW TRIAL.

Is a verdict given against a party, either from misdirection of the judge, 1, or from the rejection of evidence, 2, or the wrong admission of evidence, 3; or is the verdict against evidence, 3, or given for excessive damages, 4, (but not usually for smallness of damages, 5,) or wrongly given from default or misconduct in the jurors, 5, the witnesses, 6, or parties, 7, or the party's attorney, 9, or of the sheriff or other officer, 9, or from irregularity at the trial, 9, (but not usually for error in the pleadings, &c., 10), or from the party being taken by surprise, 11?—Move for a new trial. How, in cases of contested rights to land, &c., 12; how in penal actions, 12; or in hard or trifling actions, 12.

Does the judge at the trial wrongly nonsuit a plaintiff?—Move to set aside the nonsuit. 13.

Is the verdict given, with liberty to move to enter a nonsuit?—Move accordingly. 14.

Upon the execution of a writ of inquiry, is the verdict wrongly given, under such circumstances that a verdict in a trial at *nisi prius* would be set aside?—Move to set aside the execution of the writ of inquiry. 14.

Is the verdict, given upon a writ of trial, objectionable for any of the causes for which a verdict at *nisi prius* will be set aside?—Move to set it aside. 14, 16.

Is the motion for a new trial, or to set aside a nonsuit, &c., made within the time limited?—If not, sign judgment and tax costs, &c., 16.

How, in case of an issue from a court of equity, 17; how, where the record is made up in the Common Pleas, at Lancaster, 17.

Is the motion to be made on affidavit?—You may use affidavits in shewing cause. 17.

Have circumstances occurred, which render it necessary that the rule for the new trial, if granted, should be granted upon certain terms?—In shewing cause, get the terms made part of the rule. 18, 19.

Is the party entitled to the new trial only upon payment of costs?—In shewing cause, get the payment of costs made part of the rule. 19—21.

VENIRE DE NOVO.

Is the finding of a jury imperfect or defective?—Move for a *venire de novo*. 21.

ARREST OF JUDGMENT.

Is there any defect in substance appearing upon the face of the record?—Move in arrest of judgment, 23, or bring a writ of error. 135.

JUDGMENT.

Is execution sued out before judgment signed?—Irregularity. 24.

Is judgment signed too soon?—Irregularity. 24.

Is the judgment entered in the book of the senior master of the Common Pleas?—If not, it does not affect lands as to purchasers, mortgagees or creditors. 25, 26.

Does a party, against whom judgment is obtained, become bankrupt within a year after it is entered up?—Judgment gives the judgment-creditor no preference over the other creditors. 27, 28.

After service upon the bank or public company, of judge's order to charge stock with the amount of a judgment and interest,—does the bank, &c., allow the stock to be transferred?—Bank, &c., liable for the amount to the judgment-creditor. 28.

If after charging stock, does the judgment creditor take or charge the debtor in execution?—He thereby relinquishes the order. 29.

STATUTORY JUDGMENTS.

Is a rule &c., for money or costs unpaid?—Sue out execution upon it. 30, 31.

Is a judgment of an inferior court, or any rule of such court for payment of money, unpaid?—Remove it into one of the courts at Westminster, and sue out execution. 31, 32.

JUDGMENT NON OBSTANTE VEREDICTO.

Is a plea no answer to the action, and bad after verdict, and the verdict thereon found for the defendant?—Move for judgment *non obstante veredicto*. 33.

SCIRE FACIAS.

Is the judgment more than a year old, without execution sued out upon it?—Revive it by *sci. fa.* 34.

Has execution been sued out within a year?—Any other writ of execution may be sued out afterwards, without *sci. fa.* 34.

Has the defendant waived the necessity of a *sci. fa.*?—He cannot afterwards object to a writ of execution sued out without it. 34.

Is the writ of *sci. fa.* misdirected?—Irregularity. 34.

Is the writ tested or returnable out of term?—Irregularity. 35.

Is there 15 days between the teste and return, if but one writ, or between the teste of the first and the return of the second, if there be two writs?—If not, irregularity. 35.

Does the writ pursue the judgment?—If not, irregularity. 36.

Is the judgment more than 10 years old?—Rule or judge's order. 36.

Is the judgment more than 15 years old?—Rule nisi. 36.

Is the *sci. fa.* sued out without such rule or order?—Irregularity. 36.

Is there any irregularity in the writ?—Plaintiff may move to quash it. 36.

Is judgment signed without leave of the court, where the tenant has not been summoned?—Irregularity. 37.

Is the motion for leave made within a reasonable time after the return of the writ?—If not, the rule will not be granted. 37.

Is there a variance between *sci. fa.* and the declaration thereon?—Irregularity. 38.

Is the execution on the original judgment, instead of on the judgment of *sci. fa.*?—Irregularity. 38.

REMITTITUR DAMNA.

Do the jury give greater damages than are laid in the declaration?—Enter a *remittitur* of the excess. 38.

Where the verdict is given severally on each count, is one of the counts bad?—Enter a *remittitur* of the damages found upon that issue. 38.

Do the jury give damages where they ought not?—Enter a *remittitur.* 38, 39.

COSTS.

In all personal actions, (except trespass and case) where the debt or damages are under 40s., does the judge certify under stat. 43 Eliz. c. 6.?—If so, no more costs than debt or damages. 40.

- Is this certificate granted when it ought not?—Move that the master tax full costs. 41.
- In trespass (not being trespass after notice) or case, are the damages under 40s.?—No costs, unless the judge certify. 42.
- In trespass, is the action against an inferior tradesman or apprentice, for a trespass in hunting, fishing, or fowling?—Full costs. 44.
- Does the judge certify that it was malicious?—Full costs. 44.
- Has the defendant been holden to bail, without reasonable or probable cause?—Defendant to have costs. 44.
- Might the defendant have been sued in a court of requests &c.?—In what cases plea in bar, 54; in what, move for leave to enter a suggestion, *Id.*; in what, move to stay the proceedings, *Id.*
- Is a verdict given for defendant?—Costs. 56.
- Is a verdict given for one of several defendants?—Costs, unless the judge certify. 57.
- Where there are several issues, are any of them found for defendant?—Costs on them to be deducted from plaintiff's costs. 58.
- Where there are two or more counts or pleas embodying the same cause of action or defence?—Verdict and costs against the party, on those counts or pleas under which he fails to make out a distinct matter of complaint or defence. 61.
- In an action on a judgment, is judgment on *nul tiel record* given for plaintiff?—Move for a rule nisi that the plaintiff be allowed his costs. 62.
- In trespass, does the plaintiff new assign, and you allow judgment to go by default on the new assignment?—Withdraw the general issue, if pleaded, and if the plaintiff then proceed to trial, the defendant will be entitled to the costs of the cause. 63.
- Are costs taxed *ex parte*, without a sufficient notice, where required?—Apply to refer it to the master to retax. 66.
- In the Exchequer, are costs taxed without previously sending a copy of the bill of costs?—Irregularity. 67.
- In taxing costs between attorney and client, does it appear that any of the business turned out to be useless, from the negligence or ignorance of the attorney?—Insist that the charges be struck out. 67, 68.
- In taxing costs between party and party, does it appear that any of the proceedings were clearly unnecessary?—Insist that the charge be struck out. 69.
- In a special jury case, is a verdict found for the party who

- moved for the jury?—Apply to the judge to certify that the costs of it be allowed. 73.
 In *assumpsit*, debt, or covenant, is the sum recovered or paid into court £20 or under?—Insist on the costs being taxed on the lower scale. 74.
 Is the master wrong in the taxation?—Move that he review his taxation. 82.

EXECUTION GENERALLY.

- Is execution sued out before judgment?—Nullity. 83.
 Is there a variance between the execution and judgment? Irregularity. 86.
 Where two writs are running at the same time, are both executed?—Move to set aside the execution of the writ last executed. 83.
 If under a *fi. fa.* any sum be levied, is another writ of execution sued out, before the former is returned?—Irregularity. 83.
 Is a *fi. fa.* or *ca. sa.* sued out instead of a *testatum* writ?—Irregularity. 84.
 Does the writ bear teste before the date of the judgment?—Irregularity. 85.
 In B. R. has a writ of *ca. sa.* the defendant's addition and residence indorsed?—If not, move to set it aside. 87.
 Is the money levied, not paid over?—Action; or rule to pay over the money. 89.

I. FA.

- Is any thing seized under a *fi. fu.* which is not seizable under it?—Action, 90, 91.
 Does the sheriff break an outer-door to execute a writ of execution?—Action, 94.
 Does the sheriff enter the house of a third party to execute a writ of execution?—Action: if nothing be found. 94.
 Does the sheriff return to a *fi. fu.* that he has seized goods, but that they remain in his hands for want of buyers?—*Venditioni exponas*, if he be still in office: 94; if out of office, *distringas*. 94.
 Are goods sold and removed under an execution, after notice to sheriff that rent is due, without paying the landlord?—Application against the sheriff, 95: or action, 95.

LEGIT.

- Are the goods seized sufficient for the amount of the judgment and expenses?—Do not extend the lands. 97.
 Does the inquisition set out the lands by metes and

bounds?—If not it is void, and the creditor cannot recover in ejectment. 98.

Are only lands extended?—Party can have no other writ of execution. 99.

Have the debt and costs been satisfied out of the lands extended?—*Sci. fa. ad rehabendam terram*, 98; application to the court. 98.

CA. SA.

Is the defendant discharged by the plaintiff?—Plaintiff cannot afterwards sue out a writ of execution for the same debt. 99, 100.

Where there is a *ca. sa.* against two, and one only arrested, —is the one arrested discharged by plaintiff?—Neither can afterwards be arrested on the same or any other point of execution. 100.

Is he discharged for irregularity or by fraud?—A new writ of execution may be sued out. 100.

Does the plaintiff refuse to discharge the defendant, after debt and costs paid or tendered?—Action. 100; see p. 101.

Does defendant escape?—Action.

Is escape negligent?—Sheriff may retake him. 101.

Is the escape voluntary?—Sheriff cannot retake him. 101.

EXECUTION ON RULES, DECREES, &c.

Is a rule for money or costs disobeyed?—Execution. 101, 30, 31.

Is an order of a court of equity or court of review for money or costs disobeyed?—Execution. 101.

Is an order of the Lord Chancellor in a matter of lunacy, for money or costs disobeyed?—Execution. 101.

Is a judgment or rule of an inferior court for money or costs, to be enforced?—Apply to remove it, and sue out execution. 102, 31, 32.

INTERPLEADER AT THE INSTANCE OF THE SHERIFF.

Has a third party claimed property in goods seized under a writ of execution?—Apply for an interpleader. 103.

Upon showing cause, does the sheriff appear to support his rule?—If not, rule discharged with costs. 105.

Does the claimant appear to support his claim?—If not, he shall be barred from prosecuting his claim against the sheriff, but not as against the execution creditor, and usually ordered to pay costs. 106.

Does the claimant or execution creditor fail to proceed with an issue, if ordered?—Apply that he pay costs. 108.

ET OFF OF JUDGMENTS, COSTS, &c.

Where a judgment is given in an action, or an award made,—has the party, against whom it is given or made, a judgment, award or decree for money in another action or suit, &c. against his adversary?—Move to set off one judgment, &c. against the other. 109, 111, 112.

Where there is a judgment or order for costs for one party to an action,—has the other a judgment or order for costs against his adversary in the same action?—Move to set the one judgment or order against the other. 110.

ATISFACTION ON THE ROLL.

Where judgment is given in an action, are the debt or damages and costs paid?—Get a warrant from the opposite party to enter satisfaction on the roll, and enter it accordingly. 112.

MENDMENT.

Are any of the proceedings in an action erroneous?—Move or apply to a judge to have them amended. 113, 127. The like, after plea in abatement, 132; after demurrer, 133; after error, 133; after new trial granted, 134; after nonsuit, 134.

Is there a variance between a record pleaded, and the record when produced upon a trial on *nul tiel record*?—Move to amend the pleading. 128.

At the trial of a cause, is there a variance between a writing produced in evidence, and the recital of it upon record?—Move to have it amended. 128.

At the trial, is there any variance between the evidence, and any contract, custom, prescription, name or other matter not material to the merits of the case, and by which the opposite party could not be prejudiced in the conduct of his case?—Move that it be amended. 129—132.

VRIT OF ERROR.

After judgment, is there any error in the adversary's pleading, which is not cured by verdict or judgment by default?—Bring a writ of error, 135.

Is a writ of error brought upon an interlocutory judgment, or judgment of *respondeas ouster*?—Let the defendant move to quash the writ. 135.

Is a writ of error brought before final judgment has been given upon the whole record?—Move to quash the writ. 135.

Is the party, by or against whom a writ of error is brought,

- a party or privy to the record?—If not, move to quash the writ. 135.
- Is the writ by or against the proper parties in other respects?—If not, move to quash the writ. 135.
- Is the writ returnable in a wrong court?—Move to quash it. 136.
- Is no copy of the note of allowance served, or if served, is there no ground of error stated in it?—Defendant in error may sue out execution. 136.
- Does a sole plaintiff in error die before errors assigned?—The writ of error abates. 137.
- Does a feme sole, plaintiff in error, die?—The writ abates. 138.
- Does the chief justice or chief baron die before he signs the return to the writ?—The writ abates, 138.
- Is the writ bad for a defect which cannot be amended?—Move to quash it. 138.
- Is execution sued out or executed after service of the note of allowance?—The plaintiff in error may move to set aside or stay the proceedings. 138, 140.
- After service of the note of allowance, is bail (when necessary, 140,) put in and perfected in time?—If not, the defendant in error may sue out execution. 138.
- After service of the note of allowance, does the defendant in error bring an action on his judgment?—Move to stay execution in this second action. 139.
- Is the writ of error brought contrary to agreement, express or implied, or against good faith?—Move that it be nonprossed, or the proceedings upon it stayed. 139.
- Is the writ brought for delay?—Move for leave to sue out execution. 139.
- Is the writ of error brought upon a nonsuit?—Defendant may move for leave to sue out execution. 140.
- Does the plaintiff in error, within twenty days after allowance, get the transcript prepared and examined, and pay the transcript money?—If not, sign judgment of *non pros*, 142; or sue out execution, 143.
- Does the plaintiff in error assign errors within eight days after the transcript delivered over, or in twenty days in the case of a writ of error *coram nobis*, &c.?—If not, sign judgment of *non pros*. 143.
- Does the defendant in error deliver a joinder in errors, &c. within twenty days after joinder demanded?—If not, move to reverse the judgment. 144.
- Does the plaintiff fail to set down the case for argument?—The defendant may set it down. 144.
- Have paper books been delivered?—If not, case struck out.

Has one of the parties not delivered paper books four days before argument?—The other may deliver them, and the party who has omitted to do so shall not be heard, until he pay for them. 144, 145.

NOTICE TO QUIT.

Is notice to quit given, when required?—If not, this is a good defence to an ejectment. 148.

Is a notice given, not ending with the year of the tenancy?—A good defence. 150.

Is the notice otherwise insufficient?—A good defence. 149, 150.

EJECTMENT.

Is the demise laid before the accruing of the lessor's title?—Good defence. 152.

Is the notice at the foot of declaration bad for uncertainty, or misdirection?—The court will not grant a rule for judgment. 152.

Was the declaration served before the first day of term?—If not, the court (except in certain cases between landlord and tenant, *see p. 174*), will not grant a rule for judgment. 153.

Was it served on a Sunday?—The court will not grant a rule for judgment. 153.

Was it served personally on the tenant or his wife, or has the tenant admitted that he received it before the first day of term?—If not, the court will not grant a rule for judgment, absolute in the first instance. 153, 154, 157.

When not served personally, was it served on a servant, &c., under circumstances making it probable that the tenant received it?—Rule *nisi* only. 158.

When not served personally, but on a servant, &c., does it appear that the tenant keeps out of the way to avoid service?—Rule *nisi*. 159.

Is the service, under circumstances, the only one that can be made, from necessity?—Rule *nisi*. 161.

Is the affidavit insufficient in the title, or in the statement of the service?—The court will not grant a rule for judgment. 162.

Is the rule for judgment moved for, in the same or the next term after that in which the tenant is required to appear by the notice?—If not, the court will not grant it. 163.

Does the tenant, or his landlord, &c., appear and plead within the time specified in the rule?—If not, sign judgment and sue out execution. 164, 166.

- Is the plaintiff nonsuit, for not confessing lease entry and ouster?—The plaintiff may sign judgment against the casual ejector, and proceed by attachment for the costs. 168.
- Is the plaintiff nonsuit upon the merits?—The defendant may proceed by attachment on the consent rule for costs. 168, 169.
- Is a verdict given for the plaintiff?—Apply, if necessary, for immediate execution. 170.
- Is the possession vacant?—Proceed in the manner pointed out at page 171.
- Where the ejectment is for a forfeiture in nonpayment of rent, is there evidence that there was not sufficient goods upon the premises to satisfy half-a-year's rent?—Proceed as directed p. 173. If there be no such evidence, nonsuit, unless the plaintiff prove a demand of the rent in the manner pointed out in 1 *Saund.* 287 n. 16, p. 173.
- Is the ejectment by landlord against tenant for holding over, after determination of the tenancy?—The plaintiff may proceed as directed p. 175—179.
- In such a case, does the defendant fail to put in or justify bail?—Get a rule for judgment. 177

REPLEVIN.

- Has the sheriff replevied goods distrained, without a bond, or having a bond, without sufficient sureties?—Action against the sheriff. 181.
- Has the plaintiff failed to perform the condition of the replevin bond?—Action against the sureties. 182.
- Is the suit removed by a wrong writ?—Plaintiff not bound to follow it. 184.
- Does the plaintiff fail to declare?—Rule him to declare, and demand declaration; and if he do not declare in time, sign judgment of *non pros.* 184.
- Does the defendant fail to avow?—Rule him to avow, demand an avowry; and if the defendant do not avow in time, sign judgment by default. 184.
- Does the defendant fail to plead to the avowry?—Rule him to plead and demand a plea in bar; and if no plea in time, sign judgment of *non pros.* 184, 185.
- Is a verdict given for plaintiff?—Damages 2*l.* 2*s.* in London, York and some other places; 2*l.* 10*s.* elsewhere. 185.
- Is a verdict given for defendant?—Judgment at common law, *de retorno habendo*, or for damages and costs under stat. 21 H. 8, c. 19, s. 3, or stat. 7 H. 8, c. 4, s. 3, or 17 Car. 2, c. 7, s. 2, page 185.
- Has the defendant judgment of *non pros* or upon de-

murrer?—Let him sue out and execute a writ of inquiry. 185.

Has the defendant judgment?—Costs as between attorney and client. p. 186. 64.

ENAL ACTIONS.

Is the venue laid in a different county from that in which the offence was committed?—Nonsuit. 187.

ANKRUPT.

Is a certificated bankrupt arrested for a debt proveable?—Move that he be discharged. 192.

Does the plaintiff, when the defendant becomes bankrupt, elect to prove for his debt?—He must first discharge the defendant if in custody. 193.

Does the plaintiff become bankrupt between interlocutory and final judgment?—The assignees may proceed to final judgment, and make themselves parties by *scire facias*. 193.

Does the plaintiff become bankrupt before judgment?—The defendant may plead the bankruptcy. 194.

Does the defendant become bankrupt and obtain his certificate?—He may plead it in bar. 194.

In actions by or against assignees, is notice to dispute the bankruptcy given in time?—If not, not necessary to prove it. 194.

VSOLVENT.

Has the defendant been discharged under the insolvent act?—If arrested he shall be discharged. 211. Or is a *fi. fa.* sued out against his property, move to set it aside for irregularity. 212.

USTICES, ACTIONS AGAINST.

Has the time limited for bringing the action elapsed before action brought?—Nonsuit. 212.

Has there been no notice of action, or a bad or insufficient notice?—Nonsuit, 212, 213.

Is the venue laid in the county where the act complained of was committed?—If not, verdict for defendant. 214.

ONSTABLES, ACTIONS AGAINST.

If the constable have acted under a warrant, has a demand been made of a perusal and copy of it?—If not, nonsuit. 215.

AUPERS, ACTIONS BY.

Is the plaintiff guilty of any vexatious delay in the conduct of the cause?—Move to dispauper him. 216.

PRISONERS, ACTIONS AGAINST.

Does the plaintiff declare within the time limited?—If not, *supersedes*. 221, 229.

Does the defendant plead in time?—If not, judgment by default. 222.

Does the plaintiff proceed to trial, or to final judgment after judgment by default, within the time limited?—If not, *supersedes*. 223, 229.

Does the plaintiff charge the defendant in execution within the time limited?—If not, *supersedes*. 224, 229.

Is a writ of error pending, or does the defendant otherwise prevent the plaintiff from charging him in execution?—No *supersedes*. 225.

Does the defendant take any step in the cause after his right to be superseded?—This is a waiver of the *supersedes*. 230.

Is there any agreement or treaty in writing, signed by the defendant or his attorney, pending between the parties?—No *supersedes*. 230.

Has the defendant given the plaintiff any notice of his intention to apply for his discharge under the insolvent act?—No *supersedes*. 230.

ARBITRATION.

As to enforcing the award, where no cause pending, and the submission contains no clause to make it a rule of court:—Is the submission by bond?—Debt on the bond. 251. Is the submission by any other deed?—Covenant. 251. Is the submission by agreement not under seal or by parol?—Assumpsit. 251.

Does the submission contain the clause to make it a rule of court?—Award enforced by attachment. 251, 252.

Was the cause referred at *nisi prius*?—Award enforced by verdict, judgment and execution. 251.

Was the submission by rule of court, or judge's order?—Award enforced by attachment, 252, or execution, 257.

As to setting aside the award:—Is the motion made in time?—If not, rule discharged. 258.

Does the rule nisi state the objections?—If not, rule discharged, 260; or if it do, the applicant confined to the objections there stated. 260.

Is the award bad,—for misconduct in the arbitrator, 261,—or for mistake in law, &c., 263,—or that the award does not pursue the submission, 264,—or that the arbitrator has exceeded his authority, 264,—or that he has not awarded on all the matters referred to him, 265,—or that the award is uncertain, 266,—or inconsistent,

268,—or not final, 268,—or void, 270,—or founded on perjury or fraud. 270?—Move to set it aside.

AFFIDAVIT.

Is the affidavit intituled, when it ought not?—It cannot be read. 274.

Is the affidavit not intituled, when it ought?—It cannot be read. 273.

Is no addition or an insufficient one given to the deponent?—The affidavit cannot be read. 276.

Are all the facts stated which are necessary?—If not, rule refused or discharged. 278, 285.

Does an affidavit of merits, swear to a "good defence to this action on the merits?"—If not, it shall not be received as such. 279.

Is the jurat correct?—If not, the affidavit cannot be read. 280.

Does the jurat state the day on which the affidavit was sworn?—If not, the affidavit cannot be read. 282.

Is there any interlineation or erasure in the jurat?—The affidavit cannot be read. 282.

Where there are two or more deponents, are the names of all mentioned in the jurat?—If not, affidavit cannot be read. 283.

Is the affidavit made by a competent person?—If not, affidavit cannot be read. 286.

RULE.

Are all necessary parties made parties to the rule?—If not, rule refused or discharged. 286.

Is the motion made in time?—If not rule refused or discharged. 318.

Is the motion made a second time, after a former rule refused or discharged?—Rule refused or discharged. 287.

Is the rule drawn up on reading all the necessary documents?—If not, rule discharged. 288.

Has the rule nisi been properly served?—If not it cannot be made absolute unless it be waived by the party appearing to show cause. 289.

Does any person show cause, who is not a party to the rule?—No costs for or against him. 291, 292.

Where a rule is enlarged, and the rule enlarging it requires the affidavits in answer to be filed within a certain time, —are the affidavits filed within the time?—If not, they cannot be read. 293.

JUDGE'S ORDER.

Does the opposite party take any step in the cause, after

the summons is attendable, and is a stay of proceedings?

—Irregularity. 299,

Is the order served?—If not, party not bound by it. 301.

Is the order bad, or made where it ought not?—Move to rescind it. 301.

Does the party, after being served with the order, refuse or neglect to obey it?—Make the order a rule of court, serve it, demand the thing to be done, and move for an attachment, 302, 303, or sue out execution. 311.

IRREGULARITY.

Is a proceeding irregular, by not being that which ought to be taken, 314,—or by being taken too soon, 314,—or by not being conformable with that which preceded it, 314,—or by some intermediate proceeding being omitted, 315,—or by omitting to insert in or indorse on writs what is required by statute, 315?—Move to set it aside with costs.

Is the irregularity waived?—Rule discharged. 315.

Is the motion made in time?—If not, rule discharged. 318.

Does the rule correctly describe the proceeding in which the irregularity is?—If not, rule discharged. 320.

Is the proceeding irregular, so that no cause can effectually be shown against the rule?—Offer to abandon it and to pay the costs. 321.

Where the rule is a stay of proceedings, does the opposite party take any proceedings in the cause pending it?—Move to set them aside. 321.

ADDENDA

To the 2nd Vol.

*• The reader is requested to make, in the margins of his copy, the necessary references to these Addenda.

1. *New Trial.*] A wrong observation by a judge on a matter of fact which is left as a question of fact to the jury, is no ground for granting a new trial. *Taylor v. Ashton et al.* 12 *Law J.*, 363, *ex.*
5. Where in an action on the case for negligent driving, it appeared that the plaintiff had sustained serious injury, but the jury gave him but a farthing damages, the court granted him a new trial, on payment of costs. *Armitage v. Haley*, 12 *Law J.*, 323, *qb.*
5. The circumstance of two of the jurors having, on an adjournment of the trial, and before they were charged, dined with and slept in the house of the party for whom they afterwards found their verdict, does not vitiate it; it is discretionary with the court in such a case to set aside the verdict or not, and they will not do so unless there be some imputation of unfair conduct. *Morris v. Vivian et al.*, 2 *Dowl. N. C.*, 235.
6. Where one of the jury, after verdict, stated in open court, in the presence of some of the other jurymen, but not in the hearing of the associate, that the jury had drawn lots for their verdict, the court held that an affidavit of such statement was not receivable, upon a motion for a new trial. *Burgess v. Langley*, 12 *Law J.*, 257, *cp.*, 3 *Dowl. N. C.* 21.
9. Where in ejectment the cause was misdescribed in the *venire and distringas*, as being between J. S. (the lessor of the plaintiff) instead of John Doe, and the defendant; and the objection was taken at *nisi prius*, before the jury was sworn, and overruled: the court held it to be no ground for granting a new trial. *Doe v. Rhodes et al.*, 11 *Mees. & W.* 600.

10. Where a cause was taken out of its turn, upon the statement of the defendant's counsel that it was undefended; and it appeared that counsel had been instructed for the defendant, and that a notice being given that the cause would be taken as undefended, the defendant's attorney gave the plaintiff notice of an affidavit of merits, and that he would defend the cause, but not until the morning before the trial: the court set aside the verdict, on an affidavit of merits, and on the amount being brought into court within a week, the costs of the trial and of the application to be costs in the cause. *De Medina v. Shrapnell*, 12 *Law J.*, 37, *cp.*
11. Where in an action against the landlord for taking goods by way of a distress for rent, the defendant failed in proving the tenancy, by offering parol evidence of the letting, when it appeared that the holding was under a written agreement: upon an application for a new trial, on the ground that the defendant's attorney was not aware, before the trial, that the holding was under a written agreement, the court refused it. *Thorpe et al. v. Stallwood et al.*, 3 *Dowl. N. C.* 24.
12. In a penal action, when a verdict is found for the defendant, in absolute contravention of the law, whether from misdirection of the judge, or misapprehension of the law by the jury, or from a desire upon their part to take the exposition of the law into their own hands, the court will grant a new trial. *Attorney-Gen. v. Rogers*, 12 *Law J.*, 395, *ex.*
12. Where a verdict is under 20*l.*, the mere circumstance that other actions depend upon the result of the cause, is no reason for granting a new trial on the ground that the verdict is against evidence. *Leese v. Sylvester*, 12 *Law J.* 250, *cp.*
13. Where the judge, after hearing the opening statement of counsel, and before the first witness had concluded his evidence, directed a nonsuit, on the ground that the plaintiff's only remedy was in equity:—upon an affidavit of the witness that he could have proved certain material facts, if the trial had not been interrupted, the court granted a new trial on payment of costs. *Elger v. Knapp*, 3 *Dowl. N. C.* 73.
16. Where a motion is made to set aside a verdict upon a writ of trial, on the ground of misdirection, the under-sheriff should state in his notes the manner in which he submitted the case to the jury, and not leave it to be stated by affidavit merely. *Per Ld. Denman, in Ralph v. Harvey*, 1 *Ad. & El. N. C.* 845.
6. Where a new trial is moved for, on the ground of a mis-

- trial, the motion must be made within the same time as in other and ordinary cases, as for instance, where the trial is had in vacation, within the first four days in the following term. *Cheese v. Scales*, 2 Dowl. N. C. 438.
- Where after a verdict for plaintiff, in an action for a debt, the defendant became bankrupt and obtained his certificate: the court held that he had still a sufficient interest in the question to enable him to move for a new trial, on the ground of there having been no notice of trial. *Shepherd v. Thompson*, 9 Mees. & W. 110.
- Upon a motion for a new trial, counsel are not permitted to present a point which does not appear by the judge's note to have been raised at the trial. *Gibbs v. Pike et al.* 1 Dowl. N. C. 409.
- Poster v. Jolly*, 1 Cr. M. & R. 703, has been overruled. *MS. Ex.* 1843.
- Where a motion for a new trial was made after the four days, in consequence of the number of motions to be made, and an affidavit was tendered in support of it, which was made after the four days, but before the making of the motion, the court of Exchequer refused to receive it. *Williams v. Mortimer*, 11 Mees. & W. 104.
- Where a cause was tried before the sheriff, and a new trial granted, it was (under circumstances) made part of the rule that the second trial should be had before a judge at nisi prius. *Moggeride v. Drew*, 9 Dowl. 1042.
- In ejectment, after a verdict for the defendant, and pending a rule for a new trial, the lessor of the plaintiff died: this was holden to be no ground for staying proceedings, or for calling on the plaintiff for security for costs, where the interest claimed was more than an estate for life. *Doe v. Cozens*, 9 Dowl. 1040.
- Where a defendant obtained a rule for a new trial upon payment of costs, but allowed the whole of the next term to elapse without serving the rule, the court on the application of the plaintiff in the third term, discharged it. *Chase et al. v. Goble*, 3 Man. & Gr. 635. And Patteson, J. in one case granted a rule to that effect, absolute in the first instance. *Champion v. Griffiths*, 1 Dowl. N. C. 319.
- Where the defendant obtained a rule for a new trial, no mention being made of costs, and the parties then agreed to a reference, the costs to abide the event: the arbitrator having decided in favour of the defendant, it was holden that he was not entitled to the costs of the trial. *Thomas v. Hawkes et al.* 9 Mees. & W. 53.
- But where the defendant, by leave of the judge, moved for and obtained a rule nisi, to enter a nonsuit, or a verdict for him, and upon showing cause the court directed a special case, which was afterwards decided in favour

- of the defendant: the court held that the defendant was entitled to the costs of the trial. *Tobin v. Crawford et al.*, 12 Law J. 77, *ex.*
20. Where the defendant obtained a rule *nisi* for a nonsuit or a new trial, and upon cause shown it was ordered by consent that the damages should be reduced, and that on payment of such reduced damages and the taxed costs of the cause, the verdict should be vacated and a *set processus* entered: it was holden that the plaintiff was entitled to the costs of opposing the rule, as costs in the cause. *Delisser v. Towne*, 1 Ad. & El. N. C. 333.
25. *Judgment.*] Where the judgment was entered on the roll as of the 13th December, when judgment was signed, and the *postea* marked, but the costs were not taxed until the 1st February following: the court, upon application of the executors of the defendant, who had died on the 15th December, ordered the date of the entry to be altered to the 1st February. *Peirce v. Derry*, 12 Law J. 277, *qb.*
28. Where it was doubtful whether the defendant took a beneficial interest in government stock under a will, the court made an order for charging so much of the dividends as were payable to the defendant "for his own use and benefit." *Fowler v. Churchill*, 11 Mees. & W. 57; and see *Fowler v. Churchill*, 12 Law J. 233, *ex.*
28. There is an appeal to the court from the order of a judge for charging stock. *Fowler v. Churchill*, 11 Mees. & W. 57. *Dub. in Rogers v. Holloway*, 12 Law J. 182, *cp.*
28. Where the stock was vested in trustees by a deed, to set aside which, the plaintiff had filed a bill in equity, the court refused to interfere. *Rogers v. Holloway*, *supra.*
33. *Judgment, non obstante veredicto.*] The rule for judgment *non obstante veredicto*, should be drawn up on reading the record; but an objection on this ground cannot be insisted upon, if a copy of the pleadings be annexed to the affidavit on which the rule was obtained. *Beatty et al. v. Warren*, 4 Man. & Gr. 158.
34. *Scire facias.*] Where execution was sued out in ejectment, ten years after the judgment, without reviving it by *scire facias*, it was holden that even after the lapse of two terms the tenant might apply to set aside the execution. *Goodtitle d. Murrell v. Badtittle*, 9 Dowd. 1009.
34. The omission to revive a judgment by *scire facias*, before issuing a writ of execution, is an irregularity, but does not render the execution a nullity. *Blanchenay v. Burt et al.*, 12 Law J. 291, *qb.*

34. A *scire facias* may issue to revive a judgment in ejectment, although it may be a judgment merely against the casual ejector. *Doe d. Ramsbottom v. Roe*, 2 Dowl. N. C. 690.
36. Where the judgment was fifteen years old, and the defendant resident in America, but he was the owner of several houses in Liverpool, the court granted a rule nisi for a *scire facias*, to show cause in the following term, a copy thereof to be stuck up in the office, and to be served on each of the defendant's tenants in Liverpool. *Macdonald v. Maclaren*, 11 Mees. & W. 465.
37. Where the defendant was resident at Boulogne, the court allowed judgment to be signed against him on a *sci. fa.*, on an affidavit of service of the notice upon him at that place. *Stockport v. Hawkins*, 3 Dowl. N. C. 204.
38. *Remittitur damna.*] Where upon judgment by *nil dicit* in debt, for the whole amount demanded, the plaintiff sued out execution merely for the amount actually due, it was holden that this irregularity was cured by entering a *remittitur* for the excess. *Phillips v. Birch*, 4 Man. & Gr. 403.
42. *Costs.*] Where in trespass the defendant pleaded a right of way, and the plaintiff traversed the right and new assigned; the defendant joined issue on the right of way, and suffered judgment by default as to the new assignment, and at the trial it was proved that the plaintiff had given notice to the defendant not to trespass in the *locus in quo*, but the jury found a verdict for the defendant on the right of way: the court held that this was not a case within the proviso in stat. 3 & 4 Vict. c. 24, and that the plaintiff was not entitled to full costs. *Bourne v. Alcock*, 12 Law J. 258, qb. See *Pryme v. Broune*, 4 Man. & Gr. 247.
42. The court will not exercise any control over the power of a judge to certify, under stat. 3 & 4 Vict. c. 34, that an action was brought to try a right; nor over an arbitrator, if the same power be given to him. *Bury v. Dunn*, 3 Dowl. N. C. 141.
51. Where a verdict under 40s. is found for the plaintiff, it is no ground to stay the proceedings, or to deprive him of costs, that the cause might have been tried in the county court, where there is no statute upon the subject prohibiting the cause from being tried elsewhere. *Salmon v. Tugman*, 2 Dowl. N. C. 977.
54. The Bristol court of conscience act provides "that no action or suit for any debt not amounting to 40s. and recoverable by virtue of this act, shall be recovered against any person in any other court:" it was holden that the proper mode of objecting, in case of

- an action brought in another court, was by plea, not by suggestion, although the act is silent as to the remedy. *Reynolds v. Talmon*, 2 *Ad. & El. N. C.* 644.
55. The following are references to cases relating to courts of requests of particular places,
- Bolingbroke and Horncastle,—*Broadhurst v. Groundsell*, 12 *Law J.* 347, *qb.*; *Robinson v. Searson*, 13 *Id.* 7, *cp.*; *Jordan v. Berwick*, 9 *Mees. & W.* 3.
- Brighton,—*Neale v. Ellis*, 12 *Law J.* 329, *qb.*; 3 *Dowl. N. C.* 163.
- Bristol,—*Reynolds v. Talmon*, 2 *Ad. & El. N. C.* 644.
- Middlesex,—*Stillwell v. Bracher*, 12 *Law J.* 345 *qb.*
Watson v. Quilter, *Id.* 405, *ex.*
- Westminster,—*Todd v. Emly*, 11 *Mees. & W.* 610.
 22 *Law J.* 374 *ex.*
- Wolverhampton,—*Forman v. Dawes*, 12 *Law J.* 437 *ex.*
57. In an action of trespass against three, where the defendants pleaded jointly, and appeared by the same attorney and counsel, the plaintiff obtained a verdict against two of them on all the issues, and the third obtained a verdict against the plaintiff on all the issues; it was holden that this third defendant was entitled to a third of the joint costs of the defence, and had a right to have these costs deducted from the costs the plaintiff had obtained against the other two defendants. *Norman v. Climen-son et al.*, 4 *Man. & Gr.* 243.
59. Where the defendant pleaded the general issue, and also traversed a part of the declaration, which he need not to have done, as it was covered by the general issue; and the jury found for the plaintiff on the second issue, but for the defendant on the first, and the master allowed the plaintiff the costs of all his witnesses to prove the second issue, but refused to allow the defendant for his witnesses who failed in respect of that issue, but who were witnesses also upon the first issue; the court held that the master had done rightly, as it was the defendant's own fault in raising that second issue, which was in substance involved in the first. *Daniel et al. v. Barry et al.*, 12 *Law J.* 113 *qb.*, *Nicholson et al. v. Dyson*, 11 *Mees. & W.* 545.
61. If the issues upon special pleas be found for the plaintiff, and the judge certifies under stat. 4 & 5 Ann, c. 16, s. 5, that the defendant had probable cause for pleading such pleas,—the master on taxation will be justified in refusing to allow the plaintiff the costs of these issues. *Fry v. Monkton*, 9 *Dowl.* 967.
69. Where after actions brought on an attorney's bill, the defendant had it taxed, and paid the amount into court, it was holden that the costs of taxation were not costs

in the cause. *Thomas v. Mayor of Swansea*, 2 Dowl. N. C. 1003.

Where an action was brought against the sheriff for a sum under 20*l.*, and the plaintiff wished to have it tried before the coroner upon a writ of trial, but the defendant refused; afterwards and after notice of trial, the defendant applied to withdraw his plea, on payment of debt and costs; it was holden that the plaintiff was entitled to costs on the lower scale only. *Lery v. Magnay*, 2 Dowl. N. C. 512. 12 Law J. 345, *ex.*

Where in an action for unliquidated damages, not triable before the sheriff, the plaintiff, upon a summons at chambers, consented to take a sum under 20*l.* as damages, he must take care to stipulate that his costs shall be taxed upon the higher scale; otherwise he will be entitled only to costs on the lower scale. *Horn v. Pocock et al.* 2 Dowl. N. C. 948. 12 Law J. 274, *qb.*

And this taxation on the lower scale, has reference as well to a defendant's costs as to those of a plaintiff; and therefore where an action was brought for a debt under 20*l.*, and the defendant obtained judgment as in case of a nonsuit, the court held that he was entitled to costs on the lower scale only. *Williamson v. Heath*, 12 Law J. 168, *qb.*

In assumpsit for certain fees claimed, the proceedings were stayed by a judge's order, on payment of a sum under 20*l.*; the master having first taxed the costs on the higher scale, was ordered by a judge to review his taxation, and to tax them on the lower scale; the court refused to rescind this order, merely on a suggestion that the cause was a fit one to be tried before a judge. *Keppel v. Shillson et al.*, 12 Law J. 323, *qb.*

The lower scale applies to country as well as town causes; and therefore in a country cause, where the verdict was under 20*l.* and the judge refused to certify, it was holden that the plaintiff's attorney was entitled to a fee of 1*l.* 1*s.* only for his attendance at the trial. *Gibbs v. Whalley*, 13 Law J., 15, *qb.*

Execution.] The omission to sue out an original *ca. sa.* to warrant the issuing of a *testatum* writ, is a mere irregularity, of which the defendant cannot take advantage after the lapse of a reasonable time; when six years had elapsed, it was holden clearly to be too late. *Warne v. Haddon*, 9 Dowl. 960.

Where an ordinary *ca. sa.* was sued out, instead of a *testatum*, which is an irregularity, it was holden to be waived by not moving to set it aside for three terms after the arrest. *Thomas v. Harris*, 1 Dowl. N. C. 793.

86. Where a *ca. sa.* is returnable immediately, it is no objection that it has been executed more than a year and a day from its teate, provided it have issued within a year from the signing of the judgment. *Thomas v. Harris*, 1 *Dowl. N. C.* 793.
87. Where the writ of execution was indorsed for a greater sum than the plaintiff was entitled to, and that sum was levied,—the court refused, at the instance of the sheriff or of another creditor, to compel the plaintiff to refund the overplus. *Bowser v. Lloyd*, 9 *Dowl.* 1029.
87. The costs of an interpleader rule, are not “expenses of execution,” within statute 43 Geo. 3, c. 46, s. 5, and cannot be levied under a *fi. fa.*; *Hammond v. Nairn*, 9 *Mees. & W.* 221; nor are the costs of rules to return the writ of execution. *Hutchinson v. Humbert*, 1 *Dowl. N. C.* 78.
87. A sheriff may levy, under a *fi. fa.*, the amount of his fees authorised under stat. 7 W. 4 & 1 Vict. c. 55, although not indorsed on the writ, and he need not particularise their respective amounts in his return. *Curtis v. Mayne*, 2 *Dowl. N. C.* 37.
87. Where the sheriff disposes of goods, seized under a *fi. fa.* by appraisement and bill of sale, he is not entitled to deduct the expenses of the appraisement and sale; the scale of fees framed under the statute, applying to sales by auction only. *Phillips v. Viscount Canterbury*, 11 *Mees. & W.* 619.
87. In indorsing a *ca. sa.*, you cannot include the expenses of a previous *fi. fa.*, and a levy under it, and which writ was ultimately unproductive. *Earp v. Satchell et al.* 12 *Law J.*, 122, *qb.*
87. A *ca. sa.*, may be indorsed to levy the damages or costs, &c. mentioned in the writ, and also “interest thereon at four per cent.” *Pitcher v. Roberts*, 12 *Law J.*, 178, 2 *Dowl. N. C.* 394.
87. Where the addition of the defendant is not indorsed on the *ca. sa.*, the court will not on that ground discharge him out of custody, after the lapse of twenty days, for instance, unless he show sufficient cause to account for the delay. *Davis v. Watkins*, 12 *Law J.*, 293, *qb.*
89. Where several writs of *fi. fa.*, at the suit of different plaintiffs, were delivered to the sheriff to be executed, by the same attorney, and at the same time, in one bundle: it was holden that the sheriff could not call upon the plaintiffs or their attorney to declare which writs were entitled to priority; but the sheriff, it seems, may return that he has levied under all. *Ashworth et al. v. Earl of Uxbridge*, 12 *Law J.*, 39, *qb.* 2 *Dowl. N. C.* 377.
89. How fraud affects the priority of writs, see *Imray v. Magney et al.*, 12 *Law J.* 188 *ex.*

Where a *fi. fa.*, upon a judgment on a warrant of attorney, was sued out against a trader, and his goods thereupon were seized after a secret act of bankruptcy, but before fiat, and sold afterwards: it was holden that this execution could not be sustained as against the assignees; the statute 2 & 3 Vict. c. 29, did not repeal the 108th section of statute 6 Geo. 4, c. 16, nor render such an execution valid as against the assignees. *Whitmore et al. v. Robertson*, 8 Mees. & W. 463. *Skey v. Carter et al.* 11 Mees. & W. 571. 12 Law J., 511, *ex.*

So, where an act of bankruptcy had been committed by the defendant, and notice of that fact was communicated to the plaintiff's attorney before he sued out a *fi. fa.* against the defendant: this was holden to invalidate the execution as against the assignees, notwithstanding stat. 2 & 3 Vict. c. 29, and notwithstanding the writ was lodged with the sheriff before the issuing of the fiat. *Rothwell v. Timbrell*, 1 Dougl. N. C. 778.

A sheriff removing goods seized by him under an execution, after notice that rent is due to the landlord, is liable to an action. *Riseley v. Ryle*, 11 Mees. & W. 16.

Where rent became due to the defendant, after the delivery of a writ of elegit to the sheriff, but before inquisition taken thereon, it was holden that the execution creditor was not entitled to the rent. *Sharp v. Key*, 8 Mees. & W. 379.

Where a plaintiff, who had proceeded to judgment, instead of suing out execution, proceeded against the defendant in the mayor's court by foreign attachment, and the defendant surrendered in dissolution of the attachment; the plaintiff then, and whilst the defendant was in custody, send out a *ca. sa.* upon the judgment, and detained the defendant: the court held that the *ca. sa.* was not irregular; it was merely matter of application to the discretion of the court, whether the plaintiff should resort to two remedies at the same time; and here the court could not interfere, as the proceedings in the mayor's court were at an end. *Chamberlayne v. Green*, 1 Dougl. N. C. 649.

87. A *ca. sa.* upon a nonsuit, although for costs only, may direct the sheriff to levy interest also, and may be indorsed accordingly. *Pitcher v. Roberts*, 2 Dougl. N. C. 394.

Where the defendant, against whom a *ca. sa.* issued, was too ill to be removed, the court enlarged the time for returning the writ, but held that they could afford the sheriff no relief for the extra expense incurred in keeping the defendant in custody. *Jones v. Robinson*, 2 Dougl. N. C. 1044.

100. If a defendant arrested upon a *ca. sa.* be discharged out of custody for irregularity, that does not prevent his being again taken on another *ca. sa.* on the same judgment. *Merchant v. Frankis*, 3 *Ad. & El. N. C.* 1.
100. So, a defendant, who is arrested upon a *ca. sa.* and discharged on the ground that he was arrested at a time when he was privileged from arrest, may be again arrested on another *ca. sa.* on the same judgment. *Phillips v. Price*, 12 *Law J.*, 348, *qb. 3 Dowl. N. C.* 110.
101. Where after a voluntary escape, the plaintiff in the action allowed the sheriff to use his name in suing out a fresh *ca. sa.* and arresting the defendant, the court set aside the writ and discharged the defendant, and held that it was so much a matter of right, they had no power to impose upon the defendant the terms of not bringing an action. *Gillett v. Aston*, 12 *Law J.*, 5, *qb. 2 Dowl. N. C.* 413.
101. An order in equity, that a party should pay in a certain sum to the account of the accountant general, being the admitted amount of the sale of a trust fund, was holden to be within the equity of statute 1 & 2 *Vict. c. 110, s. 18.* *Gibbs v. Pike*, 12 *Law J.*, 257 *ex.*
104. Where the defendant claims the goods, as holding them merely as trustee for another, the sheriff is entitled to a rule for interpleader. *Fenwick v. Laycock*, 2 *Ad. & El. N. C.* 108.
106. If the claimant do not appear upon the rule, the sheriff is not entitled to costs against him. *Jones v. Lewis*, 8 *Mees. & W.* 264.
107. Where a judge at chambers, with the consent of parties, disposes of an interpleader application, the court have no authority to review the judge's decision. *Shortridge et al. v. Young*, 13 *Law J.*, 30, *ex.* But where the judge merely rescinded a former order directing an issue, acting merely within the authority given him by the statute, it was held that the court might review it. *Tiggen v. Langford*, 12 *Law J.*, 76, *ex. 2 Dowl. N. C.* 467.
107. If the claimants fail upon the issue, the course is to require them to pay the costs of the application and of the subsequent proceedings; and the same, where they claim as assignees of a bankrupt, and fail from the insufficiency of the proof of the bankruptcy. *Melville et al. v. Smark*, 3 *Man. & Gr.* 57.
108. When money is paid into court, to abide the event of an interpleader issue, the application by the successful party to obtain the money out of court, must be made in the original action, and not in the issue. *Leri v. Coyle*, 2 *Dowl. N. C.* 932.
118. The judge at the trial of an ejectment, allowed the decla-

- ration to be amended in the date of the demise, although the action was for a forfeiture. *Doe v. Leach*, 9 *Dowl.* 877. *Doe v. Hall*, 3 *Dowl. N. C.* 49, 12 *Law J.*, 239, *cp.* *Doe v. Heather*, 1 *Dowl. N. C.* 64.
122. In 1837 particulars of demand were delivered; in 1841 the action was referred; and after that the court allowed the plaintiff to amend his particulars, by adding other items of claim. *Blunt v. Cook*, 4 *Man & Gr.* 458.
126. Where nominal damages were given generally on a declaration of several counts, and one of the counts was bad, the court refused to arrest the judgment, but awarded a *venire de novo*. *Lewin v. Edwards*, 1 *Dowl. N. C.* 639.
128. A judge at the trial has power to determine the amount of costs, on payment of which he will allow a defendant to amend a plea; and the court will not review his decision in that respect. *Tomlinson v. Bollard*, 12 *Law J.*, 257, *qb.*
136. *Writ of Error.*] Where a second writ of error from the court of Queen's Bench to the Exchequer chamber, sued out by the same party, but assigning fresh causes of error, was allowed by the master, the court of Queen's Bench upon application quashed the allowance, with costs. *Holmes v. Newlands*, 12 *Law J.*, 140, *qb.* 2 *Dowl. N. C.* 716.
141. Bail in error is not necessary, in error *coram nobis*. *Knight v. Thynne*, 9 *Dowl.* 984.
150. *Notice of Quit.*] As to notice to quit, where the tenant is to quit different parts of the premises at different times, see *Doe v. Rhodes*, 11 *Mees. & W.* 600.
153. *Ejectment.*] Where the declaration was regularly intitled "in the Queen's Bench," but the notice at foot required the tenant to appear in the Common Pleas, Williams, J. granted a rule *nisi* for judgment. *Doe d. Evans v. Roe*, 9 *Dowl.* 999.
154. Where the tenant was a foreigner, not understanding English, it was holden sufficient to have the declaration and notice explained to him by an interpreter. *Doe d. Cuttle v. Roe*, 9 *Dowl.* 1023.
154. Where the tenant was in prison, and the person who went to serve him with an ejectment, saw him, read and explained the declaration to him, and was proceeding to read the notice, when he was assaulted by the inmates of the prison, and forced out of the gates: the court granted a rule *nisi*. *Doe d. Mann v. Roe*, 11 *Mees. & W.* 77.
158. Where the service was on a servant of the tenant, and on the second day of term the tenant, having then the

- declaration in his hand, agreed that the service should be deemed good service, but did not state when he had received the declaration : the court granted a rule nisi. *Doe d. Middleton v. Roe*, 3 Doucl. N. C. 149.
161. Where the tenant is abroad, and the declaration is served upon an agent, the agency must be distinctly sworn to; it is not sufficient for the party who served it, to swear that he was told so by the person he served, and that he believes it. *Doe d. Nottige v. Roe*, 4 Mas. & Gr. 28.
161. Where the premises were in the occupation of a charitable association, service on the matron on the premises, and on the secretary, and an acknowledgment by their solicitor that he had received the declaration, was holden sufficient for a rule nisi. *Doe d. Fishmongers' Company v. Roe*, 2 Doucl. N. C. 689.
171. Where after the lessor of the plaintiff had been put into possession by a writ of *habere facias possessionem*, the tenant subsequently came and forcibly dispossessed him : Wightman J. granted a rule nisi why a new writ should not issue. *Doe d. Lloyd v. Roe*, 2 Doucl. N. C. 407. *Doe d. Pitcher v. Roe*, 9 Doucl. 971.
197. Where the writ of summons described the plaintiff "executor," &c. not stating that he sued as executor, and the declaration was general in his own right, it was holden to be no variance. *Free v. White*, 1 Doucl. N. C. 586.
213. Notice of action to a justice of the peace, may be signed by the intended plaintiff; and it is not necessary that it should be served by his attorney. *Morgan v. Leach et al.* 2 Doucl. N. C. 522.
216. A plaintiff may be allowed to continue, in *formâ pauperis*, a suit already commenced by him; but in such a case, if the defendant succeed, the plaintiff will be liable for the costs up to the time of his being admitted to sue as a pauper. *Doe v. Owens*, 2 Doucl. N. C. 426. *Pitcher v. Roberts*, *Id.* 394.
217. The court will not grant a distringas against a peer, where it is for the purpose of proceeding to outlawry against him. *Taylor v. Ld. Stuart de Rothsay*, 2 Doucl. N. C. 121.
221. Where instead of serving a prisoner personally with a declaration, or leaving it for him at the office of the Queen's prison, it was delivered to an attorney who had acted for him in a previous proceeding in the same cause : the service and subsequent proceedings were set aside for irregularity. *Spencer v. Newton*, 6 Ad. & El. 630.
228. Where a prisoner comes up to be charged in execution, he cannot allege any irregularity in the proceedings, or the illegality of his arrest, in opposition to his being committed; any application on such a ground must be

made the subject of a rule nisi. *Aldridge v. Stanford*, 3 *Man. & Gr.* 409.

31. A prisoner who is remanded to an inferior prison by the Insolvent Court, for a certain time, at the suit of a particular creditor, and the creditor sues out a *capias* against him, he may notwithstanding remove himself by *habeas corpus* to the custody of the keeper of the queen's prison, by a writ of *habeas corpus cum causa*. *Samuel v. Nettlehip*, 3 *Ad. & El. N. C.* 188.

35. *Arbitration.* Where a cause is referred, a clause is now very commonly introduced into the submission, giving to the arbitrator all the powers of amendment, and of certifying as to costs, which the judge would have had, if it had been tried at *nisi prius*. And another clause is now very commonly introduced, in all cases where the court will have cognizance of the award, when made, namely, that if the court shall be dissatisfied with the award or certificate of the arbitrator, they may refer the matter back to him, and order that the costs thereof shall abide the event.

40. Where a cause was referred by judge's order, which required the award to be delivered to the parties, "or if they or either of them should be dead before the making thereof, to their personal representatives;" and after several meetings the defendant died; upon application to the court to grant a rule compelling the arbitrator to proceed in the reference, the court held that they had no authority to do so. *Lewin et al. v. Holbrook*, 2 *Dowl. N. C.* 991. 12 *Law J.*, 267, *ex.*

42. Where a matter was referred to two arbitrators, and such third person as they should appoint, or the majority of them, and the two arbitrators having disagreed, each made a written statement as to what he thought the award should be, and submitted it to the umpire, and the umpire and one of the arbitrators, without any meeting of the three, made the award: this was holden bad. *Re Templeman & Reed*, 9 *Dowl.* 952.

47. Where a cause at *nisi prius* was referred, and a verdict for 50*l.* taken subject to the award or certificate of an arbitrator, and he certified that a verdict should be entered for the plaintiff on the general issue, and for the defendant on an issue on a special plea which went to the whole cause of action: this was holden sufficient, without his giving any directions as to the 50*l.* damages. *Nalder v. Butts*, 13 *Law J.*, 10 *qb.*

49. Where the arbitrator found two pleas, which went to the whole cause of action, for the defendant, but found other pleas for the plaintiff, and gave him 7*s.* damages.

- the court held that the damages might be rejected as surplusage, and that the master was right in giving the defendant the general costs of the cause. *Ross v. Clifton*, 12 *Law J.*, 265, *qb.*
249. Where in an action on the case to try a right, the arbitrator by the submission had a power to certify as to costs, and having found for the plaintiff a farthing damages, he refused to certify that the action was brought to try a right: the court refused to send it back to him to amend his award in that respect. *Perry v. Dunn*, 12 *Law J.*, 351, *qb.*
250. Where a cause was referred by order of *nisi prius*, the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator, who should ascertain the same: the court held that the arbitrator was bound to ascertain the amount of the costs of the reference and award; but the party having consented to waive those costs, the court allowed the other part of the award to stand. *Morgan v. Smith*, 1 *Dowl. N. C.* 617.
257. Upon an application for a rule *nisi* to pay money awarded, with a view to sue out execution, the court refused to allow service of the rule by affixing it in the master's office, the party being then abroad; they said that a fair ground must be shown for supposing that he had seen the award, and knew its contents. *Wilson v. Foster*, 12 *Law J.*, 330 *cp.*
264. Where in replevin, the issue was as to the right of the defendants, husband and wife, to a certain annuity left upon condition to the wife by will, and the cause and all matters relating to the annuity were referred to an arbitrator, and the award directed the payment of 50*l.* as due when the distress was made, and 40*l.* as having accrued since, and directed that both sums should be paid to the wife: this was holden good. *Wynne v. Wynne et ux.* 9 *Dowl.* 901.
264. Where a cause and all matters in difference were referred to a legal arbitrator, pending a demurrer to a plea, and the arbitrator by his award ordered judgment on the demurrer to be entered for the defendant: the court refused to set aside his award on that ground. *Matthew v. Davis*, 1 *Dowl. N. C.* 679.
264. 265. 249. Where an action was referred at *nisi prius*, with power to the arbitrator to certify as to costs, and to determine what he should think fit to be done by either party; and he awarded that the verdict for the plaintiff should stand, but that the damages should be reduced to 1*s.* and he found that the action was brought to try a right, but he gave no directions as to

what in future should be done by either party: the court held that the arbitrator was not bound to state what right the action was brought to try,—that although he might, he was not bound to direct what should be done by the parties in future,—and (it appearing that the defendant pressed him to order the judgment to be arrested, which he refused to do) that he had no power to do so. *Angus v. Redford*, 11 Mees. & W. 69. 2 Dowl. N. C. 735.

267. 265. Where a cause, consisting of several issues, was, together with all matters in difference, referred to arbitration, the cost of the cause to abide the event, and the arbitrator by his award awarded that the plaintiff should pay to the defendant 16*l.* 10*s.* 2*d.* being the balance he found to be due from the one to the other: the court held the award to be bad for uncertainty, first in not stating upon what issue he found; and secondly, as containing no adjudication at all upon the cause. *Pearson v. Archbold*, 11 Mees. & W. 477.
267. Where an action, consisting of several issues, was referred, and the arbitrator awarded that judgment should be entered up for the plaintiff on the whole declaration, and that the defendant should pay the plaintiff 5*l.*: the award was holden void, in not stating for what sum the judgment should be entered up. *Laud v. Hudson*, 12 Law J., 365 *qb.*
272. *Affidavit.*] It is no objection to an affidavit that it is intituled "in the Exchequer," instead of "in the Exchequer of Pleas." *Hands v. Clements*, 12 Law J., 437, *ex.*
277. Where a deponent described himself as *acting* as managing clerk to J. S. of, &c. attorney for the plaintiff, this was holden to be too loose a description, and insufficient. *Graves v. Browning*, 6 Ad. & El. 805.
281. An affidavit intituled in the court, and sworn before a commissioner, where the jurat was "sworn before me H. Bradley, by commission," was holden sufficient. *Hopkins v. Pledger*, 3 Dowl. N. C. 119. 12 Law J., 313, *qb.*
289. Service of a rule to compute at the defendant's dwelling-house, upon a female whom deponent "believes to have authority to receive messages for the defendant," has been holden insufficient. *Brandon v. Edmonds*, 2 Dowl. N. C. 225.
289. Service of a rule to compute on a defendant, who was a publican, by leaving it with a person in the bar, has been holden insufficient. *Monroe v. Reader*, 1 Dowl. N. C. 564.
289. Service of a rule to compute on the keeper of a hotel,

- where the defendant and his family were residing, was holden sufficient. *Gosling v. Best*, 1 *Dowl. N. C.* 333.
289. Service of a rule to compute, on the sister of the defendant at his residence, circumstances showing her to be his agent being sworn to, holden sufficient. *Archer v. Evans*, 1 *Dowl. N. C.* 861.
289. Service of a rule to compute, by putting it into the defendant's letter box, and his clerk afterwards stating that he had taken it out and given it to him, holden sufficient. *Rayner v. Hodges*, 1 *Dowl. N. C.* 863.
292. Where a defendant makes an affidavit of merits, the plaintiff cannot make an affidavit in answer. *Blewitt v. Gordon*, 1 *Dowl. N. C.* 815.
293. Where a party about to shew cause against a rule, has not obtained office copies of his opponent's affidavits, it is discretionary with the court whether they will grant him time to obtain them. *Re Rogers*, 9 *Dowl.* 926.
297. Where affidavits have not been filed in time, but the opposite party, knowing of it, obtained office copies of them, this was holden to be a waiver of the objection. *Re Mackay et al.* 12 *Law J.*, 337, *qb.*
317. Obtaining time to reply, is a waiver of an objection that the plea is not an issuable one, the defendant being under terms to plead issuably. *Trott v. Smith*, 9 *Mees. & W.* 765.
318. A promise to pay the debt, is a waiver of a defect in the service of a writ of summons. *Holt v. Ede*, 3 *Dowl. N. C.* 68.
318. Appearing before the sheriff, and defending the action, is a waiver of defects in a writ of trial. *Masters v. Dary*, 2 *Dowl. N. C.* 340.
318. Where a cause was set down in the list of new causes for the adjournment day in London, and the defendant's attorney was informed that the plaintiff intended to try it on the adjournment day, and he then applied to a judge at chambers, but unsuccessfully, to have the cause struck out of the list: this was holden to be a waiver of a defect in the notice of trial, in not stating whether the cause was to be tried on the first day of the sittings, or on the adjournment day. *Younge v. Fisher*, 2 *Dowl.* 637.
318. Taking the declaration out of the office, is no waiver of an objection that the form of action in the declaration varies from that stated in the writ of summons. *Driever v. Harrison*, 3 *Dowl. N. C.* 72.

INDEX.

A.

- ABANDONING irregular proceedings, how, 321.
- Abatement, pleas in amendment of, 115; amendment of declaration after, 132.
- Abatement of writ of error, by death, &c. 137.
- Absence of witness, in what cases a ground for a new trial, 6.
- Absolute rules, in the first instance, in what cases, 287.
- Action by an attorney, for the amount of his bill of costs, 190; process and declaration, 190; defence to it, 191.
- Actions by or against corporations, 196.
- Action against hundredors, 201; against the inhabitants of a city, town, &c. 201.
- Actions by husband and wife, 202. Actions against them, 203; execution, 203.
- Actions by infants, 204; by *prochein amy* or guardian, 204, 205; costs, 205. Actions against infants, 206; he must defend by guardian, 206; appearance, 206; costs, execution, &c. 206. Warrant of attorney by infant, 207.
- Actions against justices of peace, 212; limitation of action, 212; notice of action, 212; venue, plea, &c. 214; tender of amends, 214; verdict, damages, costs, &c. 214. Actions against constables, for acting under a justice's warrant, 215.
- Action for mense profits, 180; in whose name, 180; to recover what, 180.
- Action, penal, 197; no costs for plaintiff, unless given expressly by statute, 39, 187; but otherwise, for defendant, 56, 187; otherwise also in action on statute by party grieved, 39; amendment in penal actions, 122.
- Action by pauper, 215; admission to sue in *forma pauperis*, 215; in what cases dispaupered, 216; costs, 216.
- Actions against peers and members of parliament, 217. Attachment against them, 217. Proceedings against them under the bankrupt act, 217.
- Actions against prisoners, 218. See "*Prisoner.*"
- Actions trifling, in what cases new trial refused in, 12.
- Addition of deponent in an affidavit, 276.
- Administrator, actions by, 197; process, &c., 197; costs, 197.

- Actions against them, 199; process, &c., 199. *Devastavit*, 200.
- Admission by plaintiff in error that the writ is for delay, its effect, 139.
- Admission of evidence, erroneously, in what cases ground for a new trial, 3.
- Admission of pauper to sue in *forma pauperis*, 215.
- Affidavit, generally, 271; form of it, 271; title of the court, 272; title of the cause, 273; deponent's addition, 276; body of the affidavit, 278; signature, 279; jurat, 280. When to be sworn, 283. Defects waived or remedied, 283; in what cases amended, 115.
- Affidavit, not to be received by arbitrator, 244.
- Affidavit for an attachment, 307.
- Affidavit for costs under court of requests act, 55.
- Affidavits in ejectment: affidavit of service of declaration, 156; affidavit for judgment, in action by landlord against tenant for a forfeiture, 173, 174.
- Affidavit to impeach a verdict, by imputing corrupt motives to one of the jurors, not receivable, 6.
- Affidavit for new trial, 17.
- Affidavit, office copies of, in what cases necessary, 293.
- Affidavit against a member of parliament, under the bankrupt law, 218.
- Affidavit on moving for a rule, 285; affidavit of service of the rule, 285; affidavit in shewing cause against it, 292; no affidavit allowed in reply, 293.
- Affidavit in moving to set aside proceedings for irregularity, 321.
- Agents, demand by, in order to found an attachment, 307. Notice to quit, given by, 149.
- Allowance of a writ of error, 136; note of allowance, 136.
- Alteration of affidavit, its effect, 114; the like, of an award, 247.
- Ambassadors and their domestics, their property cannot be taken under *a. fa.*, 93.
- Amendment, 113; must be by leave of the court or a judge, 113, 114; upon what terms, 114; how, on payment of costs, 114.
- Amendment in particular instances, 115:—of plea in abatement, 115; of affidavit, 115; of appearance, 115; of submission to arbitration, 236; of avowry, &c., 116; of bail piece, recognizance of bail, &c., 116; of *scire facias* against bail, or declaration thereon, 116; of *capias*, or copy of it, 117; of declaration, 117; of declaration in ejectment, 118; of writ of inquiry and inquisition, 119; of writ of error and transcript, 119; of writ of execution, 119; of the issue, 120; of judgment, 121; of the *nisi prius* record, 121; of orders of *nisi prius*, 122; of particulars of demand, 122; in penal actions, 122; of pleas,

123; of records, 124; of replication, 124; of rules, 125; of *scire facias*, 125, 116; of verdict and *postea*, 126.

Amendment at the trial, 127: by consent, 127; or without consent in matters of trifling importance, 127; upon trial by the record, 128; by statute, 128; in cases of variance between written instruments produced in evidence, and the record, 128; or between the proof and statement of contracts, customs, prescriptions, name, or other matter, 129.

Amendment at other times, 132: after plea in abatement, 132; after demurrer, 133; after error, 133; after new trial granted, 134; after nonsuit, 134.

Amends, tender of, in actions against justices, 214.

Annuity, rule to set aside, how to be drawn up, 288.

Appearance in ejectment by landlord, 166; by tenant, 164; in actions against husband and wife, 203; in actions against idiots or lunatics, 204; in actions against infants, 206; in replevin, 184; in *scire facias*, 38.

Appearance, amendment of, 115.

Appointment for taxing, one sufficient, 66.

Arbitration, 235. The submission, 235; by whom, 236; by order of *nisi prius*, 236; by rule of court or judge's orders, 237; by bond or agreement, 237. Arbitrator refusing to act, 238. Revocation of submission, 239, 236.

Proceedings before the arbitrator, and the award, 241; umpire and umpirage, 241; witnesses, how compelled to attend, and how sworn, 243; examination of the parties, in what cases, and how, 244; time for making the award enlarged, 244; the award, 246; costs, 248—250; costs for delaying the proceedings, &c. 251.

Enforcing the award, 251: on a submission by deed, &c., 251; where a cause is referred at *nisi prius*, 251, 236; where the submission is by rule of court or judge's order, 252. Attachment for non-performance of the award, 252; in what cases, 252; making the submission a rule of court, 254; service of award, and demand of performance, 254; affidavit, motion, &c. 255.

Execution for the sum awarded, 257.

Setting aside the award, 258; when and how, 258. For what defects it may be set aside, 261; misconduct of the arbitrator, 261; mistake in law, &c. 263; award not pursuing the submission, 264; arbitrator having exceeded his authority, 264; or not having awarded on all the matters referred to him, 265; award being uncertain, 266; or inconsistent, 268; or not final, 268; or void, 270; in what cases for perjury or fraud, 270.

Arrest upon an attachment, 309, 310; upon a *ca. sa.*, 99; arrest without reasonable or probable cause, defendant to have costs, 44.

- Arrest of judgment, 23 ; when motion to be made, 23 ; costs, 64.
- Assignees of bankrupt, actions by or against, 194 ; in what cases they may proceed in an action already commenced by the bankrupt, or bring a new action, 193, 194.
- Assignment of replevin bond, 182 ; action by assignee, 182.
- Assignment of errors, 143.
- Assumpsit, to enforce an award, in what cases, 251.
- Attachment, 303 ; in what cases, 303 ; for disobeying a rule of court, 303 ; in other cases, 304 ; against peers, 305 ; proceedings for obtaining the writ, 305 ; service and demand, 305 ; affidavit thereof, 307 ; rule, &c. 307. The attachment and proceedings thereon, 309 ; the writ, 309 ; arrest, 309 ; interrogatories, 310 ; master's report, 311 ; judgment, 311.
- Attachment, for not performing an award, 252 ; for non-payment of costs in ejectment, 169 ; for turning lessor, of plaintiff out, after being put in possession under a writ of possession, 171 ; against prisoners, 233.
- Attachment against a peer or member of parliament, in what cases, 305.
- Attorney, action by for the amount of his bill of costs, 190 ; delivery of bill, 190 ; process and declaration, 190 ; evidence for plaintiff under the general issue, 191 ; defence and evidence, 191.
- Attorney, action against him, 191 ; in what court, 192 ; process and declaration, 192 ; plea, 192.
- Attorney, when commissioner for taking affidavits, in what case his client may be sworn to an affidavit before him, 281.
- Attorney, power of, to demand money, &c. for the purpose of obtaining an attachment, 306.
- Attorney, power of, to execute a lease in ejectment upon a vacant possession, 172.
- Attorney, service of declaration in ejectment upon, 159.
- Avowry, 184 ; rule to avow, 184 ; demand of avowry, 184 ; judgment by default, 184. Avowry how pleaded, 184 ; in what cases it may be amended, 116.
- Award, 246. See "*Arbitration*." In what form, 246 ; stamp, 247 ; cannot be altered, 247 ; in what cases a certificate instead of an award, 247. How enforced, 251. For what defects set aside, 261—270 ; it may be bad as to part, and good for the residue, 261—265 ; rule, 258—260.
- Award, costs given by, may be set off, subject to the attorney's lien, 112.
- Award of an elegit on the roll, 98.

B.

- Bail, amendment in cases of, 116; of affidavit of justification, 116; bail piece, 116; recognizance, 116; *scire facias*, 116.
 Bail upon an attachment, in what cases, 310.
 Bail in ejectment, 177.
 Bail in error, 140.
 Bank notes, may be taken in execution, 90.
 Banker's cheques taken in execution, 90.
 Bankrupt, actions against, 192; their discharge from arrest in what cases, 192; *fi. fa.* against his goods, in what cases set aside, 193; election of creditor to prove upon his estate, 193; effect of bankruptcy upon a suit, 193.
 Bankrupt, assignees of, actions by or against, 194.
 Bankruptcy, of party to arbitration, not a revocation of the submission, 240.
 Bankruptcy, seizure of goods after, under an execution against a trader, 92.
 Baron and feme, 202. See "*Husband and Wife*." "*Feme covert*."
 Bath, court of requests of, cases relating to, 55.
 Bills of exchange, taken under a *fi. fa.* 90.
 Bill of exceptions.—New trial not granted on the same point, 2.
 Bill of sale, in what cases valid as against an execution, in what not, 92, 93.
 Birmingham, court of requests of, cases relating to, 55.
 Blackheath, court of requests of, cases relating to, 55.
 Bond, arbitration, 237; form of it, 357.
 Bond, replevin, 180; in what cases, 180; how and by whom taken, 180; consequences of not taking it, 181; when and how forfeited, 182; remedy on it, 182; extent of liability of sureties, 183; sureties not discharged by time given to the plaintiff, &c. 182.
 Bradford, court of requests of, cases relating to, 55.
 Breach of covenant, ejectment for forfeiture by reason of, 172.
 Breaking doors to execute a *fi. fa.* 94.
 Brixton, court of requests of, cases relating to, 55.

C.

- Capias*, in what cases against a prisoner, 225.
Capias, amendment of, 117.
Capias ad satisfaciendum, writ of, 99: in what cases, 83—99; when against husband and wife, 203; idiots or lunatics, 204, or prisoners, 218; in ejectment, 171, replevin, 186; *scire facias*, 38; in cases of interpleader, 109; how sued

- out, 83—99; direction teste and return of the writ, 84; how indorsed, 87; how executed, 99; to whom debt and costs may be paid, 99; escape, 101; discharge of defendant and its effect, 99.
- Carrying in the rolls, when, 25.**
- Case, costs in action on the, for verbal slander, 39; and in other cases where the damages are under 40s. p. 42.**
- Casual ejector, judgment against, 163. See "Ejectment."**
- Cause shewn against a rule, 291; when, 292; affidavit, 292. See "Rule."**
- Certificate of arbitrator, instead of an award, 247; his certificate as to costs, 249.**
- Certificate as to costs: to deprive a plaintiff of costs, 40; to entitle a plaintiff to costs, 42.**
- Certificate for speedy execution, 85, 86; in ejectment, 170.**
- Certifying the record, in error, 142.**
- Charging a prisoner in execution, 224; within what time, 224; how, 225—228.**
- Chattel property, how bound by delivery of *fi. fa.* or elegit to the sheriff, 88, 89.**
- City, inhabitants of, actions against them, 201.**
- Clergymen, actions against, 195: proceedings to judgment, 195; execution by *ca. sa.*, 195; *fi. fa.*, and *fi. fa. de bonis ecclesiasticis*, 195; or by *sequestrari facias*, 195.**
- Cognizance, in replevin, 184.**
- Commissioners for taking affidavits, affidavits sworn before the party's own attorney, cannot be used, 281; except affidavits of debt, *id.***
- Committitur, in charging a prisoner in execution, 227; entry of it in the Marshal's book, 227; filing of it, 227.**
- Committitur piece, 227; filing of it, 227.**
- Compounding penal actions, how and on what terms, 188; informer may stipulate to have his costs paid, 188; notice to the proper officer, 188; motion, 188; the Queen's portion must be first paid, 188.**
- Consent clause in submission to arbitration, 237.**
- Consent rule, in ejectment, 165; how, where defendant is joint tenant, &c., with lessor of plaintiff, 166.**
- Constables, actions against, 215; demand of warrant, 215; costs, 215.**
- Contempt, attachment for, 303; contempt in not obeying a rule of court, 303; for a libel on the court, 304; for contemptuous words of it, in what cases, 304.**
- Copy of notes of under-sheriff under a writ of trial, necessary to be produced, in moving for a new trial, 15.**
- Copy of warrant, demand of, from a constable, before action, 215.**
- Copyhold, may now be extended under an elegit, 97.**
- Coram nobis*, writ of error, 146; the like *coram vobis*, 146.**
- Corporations, actions by and against, 196.**

Corruption in arbitrator, ground for setting aside the award, 261.

Costs, 39. Upon a verdict for plaintiff, 39; in what cases, 39; in what not, if the judge certify, 40; in what not, if the judge do not certify, 42; in what not, if the defendant might have been sued in a court of requests, &c., 51; and if the defendant were holden to bail for a greater sum than the plaintiff recovers, without reasonable or probable cause, he shall have costs, though the plaintiff have the verdict, 44. Costs upon a verdict for defendant, 56. Costs where there are several issues, 58.

Costs, upon trial by the record, where *nul tiel record* is pleaded, 62; upon judgment by default, 62; in case of judgment *non obstante veredicto*, 63. Costs upon arrest of judgment, 63; in error, 64, 145. Double and treble costs, in what cases, and how calculated, 64, 65.

Taxation of costs, 66; by whom and how, 66; notice of taxation, and appointment, 66; what costs allowed, 67; in taxing between attorney and client, 67; in taxing between party and party, 69; what deemed costs in the cause, 69; costs of new trial, *venire de novo*, &c., 19, 22; counsel's fees, 73; costs of special jury, 73; costs of getting up evidence, and the expenses of witnesses, 70. Taxation in a cause, where the debt does not exceed 20l., 74, 77, 78. Motion to review the taxation, 82.

Remedy for costs, 82: in personal actions, 82; in ejectment, 169, 171; upon a rule, 294.

Costs, upon arrest of judgment, 64.

Costs in award, 248; in what cases arbitrator may award them, 248; costs of the cause, 248; costs of the reference, 250; costs of the award, 250.

Costs in the cause, what deemed, 69.

Costs in actions against constables, 215; in actions against the police appointed under the municipal corporation act, 215.

Costs upon compounding penal actions, 188.

Costs, double or treble, in what cases, and how computed, 64; suggestion for, when necessary, 65.

Costs in ejectment: upon a nonsuit, 168, and how recovered, 168; upon a verdict, 169; where there are several issues, 169; for defendant, where a landlord proceeds under stat. 1 G. 4, c. 87, 177; in what cases recoverable in an action for mesne profits, 180.

Costs in error, 145, 64; upon non-prossing a writ of error, 143.

Costs in actions by executors or administrators, 197; in actions against them, 199.

Costs of feigned issue, 189.

Costs in actions by infants, 205; in actions against them, 206.

- Costs upon application by insolvent, under 48 G. 3, c. 123, 210.
- Costs upon an interpleader rule at the instance of the sheriff, 107; remedy for them, 109.
- Costs, in cases of irregularity, 322.
- Costs, by a judge's order, in what cases, 301; a judge may grant costs at chambers, 300, 301.
- Costs, upon judgment *non obstante veredicto*, 63.
- Costs, in actions against justices of peace, 214.
- Costs, in case of new trial, 19.
- Costs, upon a *nolle prosequi*, 64.
- Costs of a *non pros*, 64.
- Costs of a nonsuit, 64.
- Costs, upon *nul tiel record* pleaded, 62.
- Costs, in actions by paupers, 216.
- Costs, in penal actions, 187, 39.
- Costs, remedy for, 82; for costs of the action, 82; upon a rule, 303, 311.
- Costs in replevin, 186.
- Costs upon rules, 294; upon a rule to set aside proceedings for irregularity, 322.
- Costs in *scire facias*, 38.
- Costs, set off, in what cases allowed, 109; of costs in equity, 111; of costs under an award, 112.
- Costs, taxation of, 66; by whom and how, 66; notice of taxation, and appointment, 66; what costs allowed, 67; in taxing between attorney and client, 67; in taxing between party and party, 69; what deemed costs in the cause, 69; costs of new trial, *venire de novo*, &c., 19, 22; counsel's fees, 73; costs of getting up evidence, and the expenses of witnesses, 70. Taxation in a cause, where the debt does not exceed 20*l.*, 74, 77, 78, 80. Motion to review the taxation, 82.
- Costs, after a *venire de novo* awarded, 22.
- Counsel. See "*Barrister*." One only on each side argues writs of error, 145. Fees paid to them, what allowed upon taxation, 73.
- Counts, several, for same cause, costs for, 61.
- County court, proceedings in replevin in, 183.
- County of a city, actions against the inhabitants of, 201; process, and how served, 202.
- Court of requests. Costs, where a party who might sue in it, sues in a superior court, 51. Suggestions for, 54.
- Court of review, orders of, when treated as judgments, 30; to be registered, 31; execution upon, 31, 101.
- Covenant, forfeiture by breach of, ejectment for, 172.
- Creditors, where affected by judgments, rules, orders, &c., 25, 27, 30, 33.
- Crops of corn, &c., may be sold under a *fi. fa.* 91; cannot afterwards be distrained, in what cases, 96.

D

- Damages, in actions against justices, 214.
Damages, too great or too small, in what cases ground for a new trial, 4, 5.
Damages, in replevin, 185: for plaintiff, 185; for defendant, 185.
Death of parties, *Scire facias* upon, 34.
Death of party to arbitration, in what cases a revocation of the submission, 240.
Death of defendant, before execution, 85.
Death of plaintiff, after charging defendant in execution, 234.
Debt on award, 251.
Debt on bond of submission, 251.
Debt on judgment against an executor or administrator, suggesting a *devastavit*, 200.
Declaration, amendment of, 117; in ejectment, 118; in penal actions, 122.
Declaration in ejectment, 151; notice at foot, 152; service of it, when and how, 153—161; affidavit of service, 162, 156. See "*Ejectment*." Declaration in ejectment on a vacant possession, 172; in ejectment by landlord against tenant for a forfeiture, 173, 174, or for holding over, 175.
Declaration against husband and wife, 203.
Declaration against a prisoner, 221: within what time, 221; form of it, 221.
Declaration in replevin, 184.
Declaration in *scire facias*, 38.
Deed, submission to arbitration by, 237.
Default of jurors, witnesses, parties, party's attorney, or of sheriff or other officer, in what cases ground for a new trial, 5—9.
Defects, how objected to in an award, 258,
Defects, how waived or remedied, in an affidavit, 283. See "*Amendment*," "*Waiver*."
Defendant, addition of, in an affidavit, 277; costs upon verdict for, 56, 58.
Delaying proceedings before an arbitrator, costs for, 251.
Delivery of paper books in error, 144; of writ of execution to the sheriff, 88; of declaration to prisoner, 221.
Demand, personal, upon an award, 255; upon a rule, preparatory to moving for attachment, 306.
Demand of possession, in ejectment under 1 G. 4, c. 87, p. 176.
Demurrer in error, 144.
Demurrer, amendment after, 133.
Deptford, court of requests for, cases relating to, 55.
Deputy, to be appointed by sheriff, for taking replevin bonds and granting precepts in replevin, 181.
Derby, court of requests of, cases relating to, 55.

- Detainer, writ of, against prisoners in custody of the Keeper of the Queen's prison, 219; how directed, 219; may issue from any of the courts, 220; how sued out, 219.**
- Devastavit, proceedings against an executor or administrator upon, 200.**
- Devisee, in what cases allowed to defend in ejectment, 167.**
- Direction of a writ of detainer, 219: of a writ of error, 136; of writs of execution, 84; of a *habeas corpus*, 232; of a *scire facias*, 35.**
- Directions to taxing officers, as to the costs of actions where the debt does not exceed 20*l.*, 74.**
- Discharge, of bail in error, 140.**
- Discharge of defendant out of custody,—by reason of his bankruptcy and certificate, 192, or bankruptcy and the election of his creditor to prove, 193; effect of discharge by plaintiff, after arrest upon a *ca. sa.*, 99. Discharge of prisoner by supersedeas, 229, or otherwise, 234.**
- Disobeying a rule of court, punishable by attachment, 303. See "Attachment."**
- Distringas nuper vicecomitem*, in what cases, 94.**
- Distringas*, in replevin, 184.**
- Docketing judgments, in what cases formerly, 25.**
- Double costs, 64: in what cases, 64; how computed, 65; in what cases suggestion necessary, 65; in what cases costs as between attorney and client substituted for them, 64, 65.**

E.

- Ejectment, 151. In ordinary cases, 151: declaration and notice, 151, 152; service of it, when &c., how, 153, upon the tenant or his wife, 154, or on his servant, &c., with an admission receipt by the tenant, 157, or on servant, &c., when it is probable that the tenant received it, 156, or where the tenant keeps out of the way to avoid service, 159; service, in what cases good from necessity, 161; affidavit of service, 162, 156. Judgment against the casual ejector, 163. Appearance and plea, 164: by tenant in possession, 164; how, 165; consent rule, 165; plea, 165. Appearance and plea, by landlord, devisee, mortgagee, &c, 166; rule, 167. Issue, &c., 168. Trial, &c., 168; verdict, 169; nonsuit, and how costs in that case recovered, 168; verdict, 169; certificate for immediate execution, in what cases, 170; execution by *habere facias possessionem* for the land, and a *fi. fa.* or *ca. sa.* for the costs, 170, 171.**
- Ejectment, where the possession is vacant, 171; lease, entry and ouster, 171, 172; declaration and service, 172; rule to plead, 172; judgment and execution, 172.**

- Ejectment by landlord against tenant, for a forfeiture, 172: how, 172; how, where the possession is vacant, 174; declaration, 174; time to plead, 174; particulars of breaches, 175; notice of trial, 174, 175
- Ejectment by landlord against tenant, for holding over after the determination of the tenancy, 175: demand of possession, 175. 176; declaration and notice, 176; bail, &c., 177; trial, nonsuit or verdict, recovery of mesne profits, 178; costs, 179; execution, 179.
- Ejectment, affidavit in, how intituled, 162, 273.
- Ejectment, amendment of declaration in, 118.
- Ejectment, bail in, in what case, 177: bail in error in, 141.
- Ejectment, general general issue in, form of it, *App.*, p. 343.
- Election of creditor to prove against a bankrupt, if the latter be in custody at his suit, he shall be discharged, 193.
- Elegit, writ of, 96: in what cases, 96; direction, teste and return of, 84; how indorsed, 87; what property may be extended under it, 97; writ how executed, 98; the land how recovered back, after the judgment is satisfied, 98
- Elegit, tenant by, in what cases he may determine a tenancy, without notice to quit, 149.
- Elongata*, return of, to a *capias* in *withernam*, 187.
- Enforcing an award, 251. See "*Arbitration*."
- Enlarging the time for making an award, 244.
- Enlarging rules, 296, 291, 293.
- Enquiry, writ of, amending, 119; amending the inquisition, 119.
- Enquiry, writ of, in replevin, 185.
- Enquiry, writ of, setting aside the execution of it, 14.
- Entire damages upon several counts, consequence of one count being bad, 126; how and when remedied, 126.
- Entry of elegit and inquisition upon the roll, 98.
- Entry on the roll in error, not necessary until after judgment, 144; entry after judgment, 146.
- Entry of judgment on the roll, 25; how, 25.
- Entry of landlord, for a forfeiture, not necessary to his maintaining ejectment, 172.
- Entry of satisfaction upon the roll, in what cases and how, 112; warrant to enter it, 113; satisfaction piece, 113.
- Equity, costs in, in what cases they may be set off, 111.
- Equity, decrees and orders in, when treated as judgments, 30; to be registered, 31; execution thereon, 31, 101.
- Erasure in the jurat of an affidavit, consequence of, 282.
- Error, writ of, 135: in what cases, 135; within what time, 135; by and against whom, 135; to what court, 136. The writ, and how sued out, and allowed, 136; in what cases it abates or may be quashed, 137; how far a supersedeas of execution, 138. Bail, 140; in what cases, 140, 141; in ejectment, 141; when and how put in, 141, 142; rules for better bail, 142; justification, 142. Certifying

- the record, 142; within what time, 142; transcript only, not the record, removed, 143; transcript, how prepared, 142. Assigning errors, 143; joinder, 144; argument, delivery of paper books, &c., 144, 145; interest, 145; costs, 145, 64; judgment, &c. 146.
- Error, affidavit in, how intituled, 275.
- Error, amendment of writ of, 119; of transcript, 119.
- Error, amendment after, 133.
- Error, *coram nobis*, and error *coram nobis*, proceedings in, 146.
- Error in the pleadings, &c. when a ground for a new trial, 10.
- Escape, in what cases the party cannot be retaken, 101.
- Evidence in actions by assignees of bankrupt, 194.
- Evidence, rejection of, new trial for, in what cases, 2; in what cases, for the wrong admission of evidence, 3; or where the verdict was against evidence, 3; or where there is other evidence besides that given at the trial, 7.
- Examination of parties, before an arbitrator, 244.
- Examination on interrogatories, of persons taken upon an attachment, 310.
- Exceptions, bill of, new trial not granted on the same point, 2.
- Excessive damages, new trial in what cases for, 4.
- Execution, 83. Generally, 83: in what cases, and how sued out, 83; several writs running at the same time, 83, 96; direction, teste and return, 84; it must strictly pursue the judgment, 86; how indorsed, 87; when to be sued out, 88; delivery of the writ to be executed, 88; priority of writs, 88; remedy for the amount levied, 89.
- Fieri facias*, 90; what goods, &c. may be taken under it, 90; how executed, 94; *venditioni exponas* or *distringas* after it, 94; rent to be deducted, 95. Interpleader, 103.
- Elegit*, 96; what property may be extended under it, 97; writ, how executed, 98; writ to be returned, filed and entered upon the roll, 98.
- Capias ad satisfaciendum*, 99; how executed, 99; discharge out of custody, by the opposite party, effect of, 99; payment, to whom, 100; escape, 101.
- Execution, amendment of writ of, 119.
- Execution against clergymen, 195.
- Execution on decrees in equity, 101, 31.
- Execution in ejectment, 170, 179.
- Execution, error in what cases a supersedeas of, 138.
- Execution after error, 146.
- Execution against hundredors, &c. 201.
- Execution against husband and wife, 203.
- Execution, immediate certificate for, in ejectment, 170.
- Execution in actions, by and against infants, 205, 206.
- Execution in cases of interpleader, for the costs, 109.
- Execution on judgments of inferior courts, 102.
- Execution against lunatics or idiots, 204.
- Execution against peers and members of parliament, 217.

- Execution against prisoners, 224; *see* "prisoner."
 Execution, removal of causes from inferior courts, for the purpose of, 102; on rules of court, 101, 31, 311; on rules of inferior courts, 102.
 Execution in replevin, 186.
 Execution in *scire facias*, 38.
 Execution, speedy certificate for, in ejectment, 170.
 Execution, persons in custody upon, more than a year, for a debt under 20*l.* in what cases discharged, 207.
 Executors, 197. Actions by them, 197; process, 197; costs, 197. Actions against them, 199; process, &c. 199; costs, 199; *devastavit*, and proceedings thereon, 200.
Exoneretur, as to bail in error, 140, 141.
 Expenses of witnesses, what allowed by the master on taxation, 70

F.

- False judgment, writ of, removal of causes from inferior courts by, in what cases, 135.
 Fees to counsel, what allowed on taxation, 73.
 Feigned issue, 189; proceedings upon, 189; judgment, 24; costs, 189.
 Feme covert. Actions against her and her husband jointly, 203. *See* "Husband and Wife."
 Feme sole party, what effect her marriage has upon a writ of error, 138.
Fieri facias, writ of 90: in what cases, and how sued out, 83; direction, teste and return, 84; how indorsed, 87; it must strictly pursue the judgment, 86; delivery of it to be executed, 88; what goods, &c., may be taken under it, 90; how executed, 94; *venditioni exponas* or *distringas* after it, 94; rent deducted, 95. In what cases several writs may be running at the same time, 96; in what cases, a second writ cannot be sued out, until the first is returned, 96. *See* "Execution."
Fieri facias against a bankrupt, 192, &c.
Fieri facias, against a clergyman, 195; *fieri facias de bonis ecclesiasticis*, 195.
Fieri facias in ejectment, 171.
Fieri facias, against hundredors, 201; how executed, 201.
Fieri facias, in cases of interpleader, for costs, 109.
Fieri facias against the goods of a prisoner, 228.
 Filing, affidavits under enlarged rules, 293.
 Final judgment, 23; *see* "Judgment;" against a prisoner, within what time, 223.
 Fixtures, of tenant, in what cases they may be taken under a *fi. fa.*, 91.

Foreign affidavits, before whom to be sworn, 280 : if not in English, they must be translated, and the translation to be verified by affidavit, 280.

Forfeiture by tenant of his term, ejectment for, 172; see "*Forfeiture*."

Furns—see "*Appraisals*," 323, &c.

Frenchmen, nonresidents of, actions against, 201, 202.

Final order of reference to arbitration, obtained by, 270.

Further time when granted, to justify bail in error, 141.

G.

Gloucester, court of requests of, cases relating to, 55.

Goods, what may be taken in execution, what not, 90—94; bound by the delivery of the writ to the sheriff, 30.

Government stocks, lien of judgments upon, 28.

Growing crops, seizure and sale of, under a *fi. fa.*, 91; not afterwards distrainable for rent, 96.

Guardian of infant plaintiff, 205; cannot be removed, 205; his liability for costs, 205. Guardian for infant defendant, 206; how appointed, 206; his liability for costs, 206.

H.

Habere corpus, 231; *habere corpus cum causa*, 231; how sued out, &c. 232; in what cases amended, 120.

Habere corpus ad respondendum, in what cases formerly, 232; now not necessary, 232.

Habere corpus ad satisfaciendum, 233; to charge a prisoner in execution, 227; in what cases necessary, 233.

Habere facias possessionem, writ of execution in ejectment, 170, 171; how sued out, 170; how executed, 171.

Haldex, court of requests of, cases relating to, 55.

Heir, in what cases allowed to come in and defend an ejectment, 172.

Hier and secretments, *scire facias* against, 35.

Hired goods, cannot be seized under a *fi. fa.*, in what cases, 92.

Holding over, by tenant, ejectment for, 175.

Homesteaders, actions against, 201; process, 201; appearance, 201; execution, and how executed, 201.

Husband and wife, 202; actions by them, 202; execution, 202; actions against them, 203; appearance, 203; declaration, 203; execution, 203, 93.

I.

Idiots, actions by and against, 204.

Ignorance of an attorney, in what cases he is liable to his client for damage occasioned by it, 191.

- iterate person, affidavit by, how the jurat shall be, 281.
 immediate execution, certificate for, in ejectment, 170.
 competency of witness, where no ground for a new trial, 7.
 increasing the damages in declarations not allowed after verdict, 118; or after award, 251, 252. So no amendment of *postea*, by increasing the damages, 126.
 dorsement of writ of detainer, 219.
 dorsement of writs of execution, 87; of *fi. fa.* against the inhabitants of hundred, 201.
 dorsement of writ of summons, not amendable, 125.
 infamy of deponent to affidavit, how objected to, 284.
 infant, 204; actions by them, 204; they must sue by prochein amy or guardian, and not by attorney, or in person, 204, 205; costs, and who liable for them, 205; actions against infants, 206; they must enter appearance, the plaintiff cannot enter it for them, 206; execution, 206. Warrants of attorney by infants, void as to them, 207.
 inferior courts, judgments or rules of, when and how removable, 31; application and order, 32; effect of the removal, 32; execution upon them, 102.
 inferior tradesmen, trespass by, in hunting, &c., costs in action for, 44.
 inquest on a writ of *elegit*, 98.
 inquisition on writ of inquiry, amendment of, 119.
 inquisition on a writ of *elegit*, 98.
 insane persons, actions by or against, 204.
 insolvent, 207.
 1. Discharge of debtor, under 48 G. 3, c. 123, who has been a year in execution for a debt under 20*l.* p. 207; in what cases, 207; when and where motion to be made, 209; notice of it, 209.
 2. Actions by insolvents, 210.
 3. Actions against them, 211; plea, 211; discharge, from arrest, 211; his goods not seizable under a *fi. fa.* 211, 212, 92. Notice of intention to apply for discharge under insolvent act, suspends the prisoner's right to super-seedeas, 230.
 interest, upon a writ of error, 145.
 interlineation in the jurat of an affidavit, its effect, 282.
 interlocutory judgment, a writ of error does not lie upon it, 135. Irregularity in, when to be objected to, 319.
 interpleader, at the instance of the sheriff, 103; in what cases, 103; rule, 105; issue or action, 107; costs, 107, 108; costs upon the rule, 105, 106; affidavits, how intitled, 275.
 interrogatories for the examination of persons arrested upon an attachment, 310; in what cases, 310; how, 310.
 inventory of goods, taken under a writ of execution, 94.
 Ireland, commissioners in, for taking affidavits to be used in

- the courts of Westminster, 280; how otherwise sworn there, 280.
- Irregularity**, 313; what, 314; in proceedings against prisoners, 233; in service of rules, 290. In what cases waived, 315; by not moving in time, 316, 318; by taking a subsequent step in the cause, after knowledge of it, 316; or by express waiver, 318.
- When motion to be made, 318; for irregularity in affidavit to hold to bail, 318; in process, 318; in declaration, 319; in interlocutory judgment, 319. How if the irregularity occur in vacation, 319. And the same, where the motion is by or on the part of a prisoner, 320, 233. Rule, 320; affidavit, 321; when and how a stay of proceedings, 321; costs, 322.
- Irregularity in proceedings at the trial**, in what cases ground for a new trial, 9
- Irregular proceedings**, how relinquished, so as to avoid the costs of a motion, 321.
- Isle of Wight**, court of request of, cases relating to, 55.
- Issue**, amendment of, 120.
- Issue in ejectment**, 168.
- Issue**, in actions against prisoners, 223.
- Issue in replevin**, 185.
- Issue in *scire facias***, 223.
- Issue from a court of equity**, 189; how and by whom settled, 189; costs, 189; motion for a new trial in, where, 189.
- Issue when directed**, in cases of interpleader, 107.
- Issues**, several, costs how taxed in the case of, 58.

J.

- Joinder**, in error, 144.
- Joint tenants**, service of declaration in ejectment on one of several, 157; consent rule, in ejectment by one joint tenant against another, 166; notice to quit by one of several, 149.
- Judge**, affidavit made before, may be used in any of the courts, in what cases, 280.
- Judge's notes**, read, on argument of a rule for a new trial, 18.
- Judge's orders**, 297; in what cases, 297. **Summons**, 298; peremptory, when, 298; second summons, 298; consent indorsed, 299; attendance, 298; order *ex parte* without summons, in what cases, 299; summons, how served, 298; how far a stay of proceedings, 299. Affidavit, 300. Order, and how obtained, 300; service of it, 301. Power of the judge to award costs, 300, 301. Order, how reviewed by the court, 301; how enforced, 302.

- judge's order to discharge a prisoner by *supersedeas*, 231.
- judge's summons, 298.
- judgment, 23; when and how signed, 24; no rule for judgment necessary, 24; judgment, when and how registered, 25; when and how entered on the roll, 25. Lien of judgments on lands, &c., 27; on government or other stocks, 28. Relation of judgments, 30; from what time it binds lands, 30; chattel property not bound by it, 30.
- judgment, amendment of, 121.
- judgment, arrest of, 23; costs, 64.
- judgment on an attachment, 311.
- judgment, where the verdict was subject to an award, 251.
- judgment against casual ejector, 163; in what cases after nonsuit, 168. See "*Ejectment*."
- judgment in error, how and by whom signed, 146.
- judgments of inferior courts, when and how removed for the purpose of execution, 31; application, 32; effect of the removal, 32; execution, 102.
- judgment, irregularity in, when to be objected to, 319.
- judgment *non obstante veredicto*, 33; in what cases, 33; in what cases a writ of inquiry may be executed after it, 33; neither party entitled to costs, 34, 63.
- judgment for want of an avowry or cognizance in replevin, 184.
- judgment against a prisoner, within what time, 223.
- judgment in replevin for plaintiff, by default, 184; on verdict, 185, 186; for defendant, *de retorno habendo*, 185, 186; or for his damages and costs by statute, 185, 187; on writ of inquiry, 185, 186.
- judgment, *scire facias* to revive, in what cases, 34.
- judgment in *scire facias*, for want of appearance, 37.
- judgments, statutory,—decrees and orders in equity, rules of the common law courts, &c., when to be treated as judgments, 30; to be registered, 31; execution thereon, 31, 101.
- jurat of an affidavit, 280; form of it, 271, 272; defects in it, in what cases remedied, 284.
- jurors, new trial for default of, 5; verdict not to be impeached by their own affidavit, 6; unless of some matter which took place in open court, 10, 6, 18; new trial for treating them, 8.
- jury process, no new trial for error in the return of, 9, 6; in what cases amended, 121.
- justices of the peace, action against, 212; limitation of action, 212; notice of action, 212; venue, plea, tender of amends, 214; payment of money into court, 214; verdict, 214.
- justice's warrant, demand of perusal and copy of it, in action against a constable, 215.

L.

- Land, contested rights of, new trials in cases of, 12.
 Land, judgment binds, in what cases, and how, 27.
 Landlord, ejectment by, 172, 175: appearance in ejectment, by, 166.
 Last day of term, what motions cannot be made on, 286, 287, 292; cause cannot be shewn against a rule for setting aside an award, on, 292.
 Lease, in ejectment on a vacant possession, 171; form of it, 345.
 Leave given, when, to move to set aside a verdict and enter a nonsuit, 14; or to set aside a nonsuit and enter a verdict, 13.
Licari facias de bonis ecclesiasticis, 195.
 Libel of one party by another, previous to trial, when a ground for a new trial, 5.
 Lien of judgments upon lands, &c., 27; upon government and other stocks, 28; chattel property not bound by it, 30.
 Limitation of action against justices, 212.
 Limitation of writ of error, 135, 137.
 London, court of requests of, cases relating to, 55.
 Lord's act, relating to insolvents is repealed, 207.
 Loss of time of witnesses, in what cases money paid for, will be allowed upon taxation, 72.
 Lunatics actions by and against, 204.

M.

- Machinery, in what cases not seizable under a *fi. fa.*, 91.
 Malicious trespass, costs in an action for, 42.
 Marksman, jurat in an affidavit by, form of it, 272, 281.
 Marriage of a feme party. Its effects upon a writ of error, 138; *scire facias*, where necessary, 35.
 Marriage settlement, property under, in what cases it cannot be taken in execution for the debts of the husband, 93.
 Master's report, upon an attachment, 311.
 Members of parliament, actions against them, 217: attachments against them, 317; proceedings against them under the bankrupt act, 217.
 Mesne profits, action for, 180; what recoverable in, 180; in whose name to be brought, 180. In what cases the mesne profits may be recovered in the ejectment, 178.
 Middlesex, county court of, cases relating to, 56.
 Misconduct of arbitrator, its effects upon the award, 261.
 Misdescription of a deponent in an affidavit, 277, 278.
 Misdirection, new trial for, 1.
 Mistake of arbitrator, in his award, its effect, 263.
 Mistake in panel annexed to jury process, its effect, 6.
 Money may now be taken in execution, 90.
 Moravian, form of affirmation of, 243.

- Mortgagee, defence by, in ejectment, 167; notice to quit by, 149; when affected by judgments, rules, orders, &c., 25, 27, 30, 33.
- Motions for rules, 285, 286; for an attachment for not performing an award, 255; for an attachment in other cases, 307; as to costs, upon a court of requests act, 54; to set aside a verdict, and for a new trial, 16; the like upon a writ of trial, 14; for a *scire facias*, 14. *See also under the several heads in this Index.*

N.

- Negligence of an attorney, injury to the client by, remedy for, 191; new trial, when granted for, 9.
- New assignment, cost upon judgment for want of a plea to, 63.
- Newcastle-upon-Tyne, court of requests of, cases relating to, 56.
- New evidence, new trial when granted upon, 8.
- New trial, 1. In what cases, 1; for misdirection, 1; for the rejection of evidence, 2; for the wrong admission of evidence, 3; where the verdict is against the evidence, 3; for excessive damages, 4; for smallness of damages 5; for default, &c., in the jurors, 5; for default in witnesses, &c., 6; for default of parties, 7; for default of the party's attorney, 9; for default of the sheriff or other officer 91; for irregularity at the trial, 9; for error in the pleadings, &c., 10; where a party has been taken by surprise, 11; in cases of contested rights to land, &c., 12; in penal actions, 12; in hard or trifling actions, 12, 15. Setting aside a nonsuit, 15; setting aside a verdict and entering a nonsuit, 14; setting aside a nonsuit and entering a verdict, 14; setting aside the execution of a writ of inquiry, 14; setting aside a verdict on a writ of trial, 14. Motion, 16; when, 16; to what court, 17; affidavit, 17; rule, 17; costs, 19.
- New trial, amendment after, 134.
- Nisi prius* record, amendment of, 121.
- Non obstante veredicto*, judgment, 33; in what cases, 33; where to be moved for, 33; writ of inquiry after it, in what cases, 33, 34; costs, 34, 63.
- Non-payment of rent, ejectment for, 173. *See "Ejectment."*
- Nonpros, in error, 142.
- Nonpros, in replevin, 184.
- Nonsuit, motion for, instead of verdict, in what cases, 14; or for verdict instead of nonsuit, 14.
- Nonsuit, amendment after, 134: costs of, 64.
- Nonsuit in ejectment, 168; for defendant's not confessing lease, entry, and ouster, 168; on the merits, 168; costs, in such cases how recoverable, 168, 169.

- Nonsuit, error upon a judgment of, 135 ; in what cases not a supersedeas of execution, 140.
- Nonsuit, setting aside, and granting a new trial, 13.
- Note of allowance of a writ of error, 136.
- Notes of the judge, upon shewing cause against a rule for a new trial, 18.
- Notes of the under-sheriff, &c., upon moving for a new trial upon a writ of trial, 15.
- Notice of action to justices of peace, 212.
- Notice of bail in error, 141.
- Notice to dispute a bankruptcy, in an action by or against assignees, 194.
- Notice to declaration in ejectment, 152 : the like in ejectment for holding over, 176.
- Notices by insolvent, in execution for a debt under 20*l.* 209.
- Notice of motion, in what cases, 287 ; when, to stay proceedings, 287.
- Notice to officer, upon compounding penal actions, 188.
- Notice to plead, on declaration against a prisoner, 222.
- Notice to quit, 148 ; in what cases, 148 ; by and to whom given, 149, 150 ; form and service of it, 150.
- Notice of *scire facias*, to a defendant residing out of Middlesex, 36.
- Notice to sheriff, of rent due, after seizure under a *fi. fa.*, 95.
- Notice of taxation, 66 ; in what cases, 66 ; consequence of not giving it, 66 ; in the Exchequer, a copy of the bill of costs to be also given, 67.
- Notice of trial, in actions against prisoners, 223.
- Notice of trial, in ejectment, 168 ; proof of, in what case necessary, 179.
- Notice of trial in replevin, 185.
- Nullity, in what cases proceedings may be so treated, and consequence of their being so, 315, 316.

O.

- Office copy, of affidavit on which a rule is obtained, before cause can be shewn, 293.
- Opening rules, in what cases, 297.
- Order of a judge, 297 : in what cases, 297 ; summons, 298 ; affidavit, 300 ; order, 300 ; costs, 300, 301 ; order, how reviewed, 301 ; how enforced, 302.
- Order for supersedeas of a prisoner, 231.
- Order of a judge at *nisi prius*, when amended, 122.
- Order of a judge, referring a cause to arbitration, 235, 237 ; the like, at *nisi prius*, 236.
- Outlawry of a clergyman, 195 ; *levari facias de bonis ecclesiasticis*, 195.

P.

- Panel of jurors, mistake in, not a ground for a new trial, 6.
- Paper books in error, when to be delivered, 144; and to whom, 144; consequence of not delivering them, 144, 145.
- Parliament, members of, actions against, 217. Attachment against, in what cases, 217. Proceedings against them, under the bankrupt law, 217.
- Parties to action, default of, in what cases ground for a new trial, 7.
- Parties to a reference to arbitration, examination of, in what cases and how, 244.
- Parties to a rule can alone be affected by it, 293.
- Partners, execution against the goods of one of two 93.
- Paupers, actions by, 215: admission to sue in *forma pauperis*, 215; in what cases plaintiff dispaupered, 216; costs, 216.
- Payment of money upon an attachment, to whom, 310; upon a *ca. sa.* to whom, 100.
- Peers, or peeresses, actions against, 217; Attachment against, 217.
- Penal actions, 187; proceedings in, 187; amendment in, 122; costs in, 187, 39; new trial in, 12.
- Penal actions, compounding, 188; in what cases, 188; notice to proper officer, 188; motion, when to be made, 188; Queen's part of the penalty to be first paid, 188.
- Peremptory summons, in what cases granted, 299.
- Peremptory paper, formerly, in the court of Queen's Bench, for enlarged rules, 296.
- Perjury, not in general a ground for setting aside an award, 270, or of granting a new trial, unless witness have been convicted, 7.
- Personal demand, when necessary, under an award, 255; under a rule, 306, 312.
- Personal service, when necessary, of a rule, 289, 305, 308.
- Petition, for leave to sue in *forma pauperis*, 216; by infant, for fiat to sue or defend by *prochein amy*, &c. 205, 206.
- Pleit, in replevin, 183; form of it, 183.
- Plaintiff, addition of, in an affidavit, 277.
- Plaintiff's costs, 39; what allowed on taxation, 67, 76, 78.
- Pleas, amendment of, 123; of pleas in bar to an avowry, 116.
- Plea in ejectment, 165; how pleaded, 165.
- Plea in error, 144.
- Plea in actions against justices, 214.
- Pleas, &c., new trial not granted for defect in, 10.
- Plea by a prisoner, 222; notice to plead, 222; rule to plead, 222; demand of plea, 222.
- Plea in bar in replevin, 184; amendment of, 116.

- Pleas**, costs, where several comprising the same defence are pleaded, 61.
- Pledges** in replevin, 181; by what discharged, what not, 182; how far liable, 183.
- Pone per railios*, in what cases, in replevin, 184.
- Possession**, writ of, in what cases and how sued out, 170; how executed, 171.
- Possession**, vacant, ejectment in case of, 171: lease, entry and ouster, 171, 172; rule to plead, 172; judgment and execution, 172.
- Postea**, 24: form of it, *App.* 323; who entitled to it, 58; in what cases amended, 126.
- Poundage**, payable to sheriff, on writs of execution, right to it, suspended by rule of interpleader, 107; none allowed upon an attachment, 310.
- Power of attorney**, to demand money, &c., previous to attachment, 306, 307; to execute lease in ejectment upon a vacant possession, 172.
- Priority of writs of execution**, 88.
- Prisoners**, 218. Actions against them, 218: process, 218; *capias*, 218; writ of detainer, 218; in what court, 220; in what cases, where the defendant is in custody on a criminal account, 220; or where he is wrongfully in custody, 220. Declaration, 221: within what time, 221; form of it, 221; to be delivered, how, 221. Plea, 222; notice to plead, 222; rule to plead, 222; demand of plea, 222. Issue and notice of trial, 223. Trial or final judgment, within what time and how, 223. Execution, 224; within what time, 224; how, 225, if in custody of the sheriff, 225; how if in custody of the keeper of the Queen's prison, in the same action in the Queen's Bench, 226; or in a different action, 227; how in the Common Pleas or Exchequer, 227, 228; how if he be in custody on a criminal account, 228; execution by *fi. fa.*, 228; plaintiff, when a prisoner, how charged in execution, 228. *Supersedeas*, for not declaring, 221; for not proceeding to trial or final judgment, 223; or for not charging defendant in execution, 224; defendant once supersedeable, always so, 229; waiver of right to *supersedeas* 230; in what cases defendant not entitled to it, 230, 225: *supersedeas*, how obtained, 231. General rule, for the keeper of the Queen's prison to discharge prisoners who are supersedeable, 231.
- Habeas corpus* against prisoner, 231: *habeas corpus cum causa*, 231; *habeas corpus respondendum*, 232; *habeas corpus ad satisfaciendum*, 233.
- In other matters, 233; attachments against them, 233; how they shall take advantage of irregularity, 233, 320; their discharge otherwise than by *supersedeas*, in what cases, 234.

- Prisoner, discharge of, when in execution a year for a debt under** 201., 207 : in what cases, 207 ; motion, when and where to be made, 209 ; notice of it, 209.
- Probable cause, holding to bail without, 44 ; what is or is not probable cause, 46—51.**
- Process, by summons or *capias* against a prisoner, 218, or by writ of detainer, 219 ; process in actions, by executors or administrators, 197, or in actions against them, 199 ; in actions against hundredors, 201 ; irregularity in, when to be taken advantage of, 318, 316 ; process against prisoners, 218.**
- Prochein amy*, how appointed for infant plaintiff, 205 ; his liability for costs, 205.**
- Prorogation of parliament, writ of error not abated by, 138.**
- Purchasers, when affected by judgments, rules, orders, &c. 25, 27, 30, 33.**

Q.

- Quaker, affirmation of, *form* of it, 243.**
- Quashing a writ of error, in what cases, 138.**
- Quit, notice to, 148 : in what cases, 148 ; by and to whom given, 149 ; form of it, 151 ; how served, 151.**

R.

- Real property, new trial when granted in actions for, 12.**
- Reasonable or probable cause, holding to bail without, 44 ; what is or is not reasonable or probable cause, 46—51.**
- Recognition of bail, when amendable, 116 ; of bail in error, 140.**
- Record of *nisi prius*, in what cases amended, 121.**
- Record, amendment of, 124.**
- Record, entries on, of the judgment, 25 ; of proceedings in error, 146 ; of award of *elegit* and the inquisition, 98.**
- Recordari fucias loquelam*, writ of, in replevin, 183.**
- Reduction of damages, 5.**
- Reference to arbitration, 235. See "*Arbitration*." Rule or order of, 237 ; amendment of, 236.**
- Reference to the master, to ascertain the rents and profits received under an *elegit*, 98 ; to report on the matter of rules, 294.**
- Registering judgments, when and how, 25—27 ; of decrees, rules, orders, &c., 30.**
- Rejection of evidence, when a ground for a new trial, 2.**
- Remainderman, allowed to defend as landlord in ejectment, 167 ; when he must give notice to quit, 148.**
- Remedy for money levied under an execution, 89.**
- Remittitur damna*, entry of, 38 : in what cases, 38.**

- Removal of cause, in replevin, 183; by *recordari facias loquelam*, 183.**
- Render, time for declaring after, 221; for proceeding to trial or final judgment after, 224; for charging the defendant in execution after, 224.**
- Rent, notice and claim of, by landlord, in case of an execution 95.**
- Rents, what, tenant by elegit is entitled to, 98.**
- Replevin, 180. Replevin bond, 180; the replevin, 181; bond how forfeited, 182; sureties how far liable, 183; in what cases discharged, 182; remedy on the bond, 182.**
- Proceedings in the county court, 183. Proceedings in the court above, 183; removal of the cause, by *recordari facias loquelam*, 183; appearance and declaration, 184; avowry or cognizance, 184; plea in bar, 184; issue and notice of trial, 185; verdict and judgment for plaintiff, 185; verdict for defendant, and judgment at common law, *de retorno habendo*, 185, or by statute for damages or arrears of rent and costs, 185. Writ of inquiry and notice, &c., 185. Costs, 186. Judgment and execution, 186; amendment of judgment, 121. Collateral proceedings in, 187: judgment as in case of nonsuit, 187; payment of money into court, 187.**
- Replication, amendment of, 124.**
- Retaking, after arrest under an attachment, 310.**
- Report of master, after interrogatories upon an attachment, 311.**
- Requests, court of, costs for not suing in, 51.**
- Rescinding orders of a judge, 301; rules, 297.**
- Rescue, attachment for, proceeding upon, 310, 311.**
- Respondeas ouster*, judgment of, error does not lie upon, 135.**
- Restitution, writ of, after error, 146; not before, 171.**
- Retorno habendo*, judgment and writ *de*, for defendant in replevin, 185, 187.**
- Return of sheriff, to an elegit, 98.**
- Return day of a writ of execution, 85; of a *scire facias*, 35.**
- Review of taxation, how obtained, 82.**
- Revival of judgment, by *scire facias*, in what cases necessary, 34.**
- Revocation of submission to arbitration, 239; by death, 240.**
- Rioters, actions against the hundred for damage done by, 201.**
- Rochester, court of requests, cases relating to, 56.**
- Roll, carrying in, when, 25.**
- Rolls, entries upon, of award of elegit and inquisition, 98; of proceedings in error, 146; of the judgment, 25; of satisfaction, 112.**
- Rules, 285: the motion and rule, 285; affidavit, 285; motion, 286; no second motion on the same subject, 287; rule, 287; service of it, 289; affidavit of service, 291. Cause shewn, &c., 291: by whom, 291; when, 292; affidavit,**

- 292; cause shewn, how, 293; costs, 294. Rules, when and how enlarged, 296; when and how opened, 297; when and how rescinded, 297.
- Rules, amendment of, 125.
- Rules in arbitration,—of submission, 237; consent in submission to make it a rule of court, 237; making submission a rule of court, 254; rule for attachment for not performing an award, 256, 257; rule to set aside the award, 260.
- Rule for an attachment, 307; when to be moved for, 307; how served, 308; what cause may be shown against it, 308, 309,
- Rule to avow, in replevin, 184.
- Rule for better bail, in error, 142.
- Rule for costs, on the courts of requests acts, 54.
- Rule to declare, in replevin, 184.
- Rule, disobeying, how and in what cases punishable by attachment, 303.
- Rules in ejectment :—consent rule, 165; landlord's rule, to be let in to defend, 166, 167; rule to plead, in ejectment on a vacant possession, 172
- Rules of inferior courts, when and how removed, 31; execution upon, 102.
- Rule of interpleader, 105; *See "Interpleader."* How entered of record, 108, 109.
- Rule to set aside proceedings for irregularity, 320. *See "Irregularity."*
- Rule on the keeper of the Queen's prison, to acknowledge defendant in his custody, 226.
- Rule for new trial, 17; not amendable, 18.
- Rule to plead, in actions against prisoners, 222.
- Rules, service of, 289; and affidavit thereof, 291.
- Rules, side bar, when obtained, 287.
- Rule of submission to arbitration, 237.

S.

- Sale, bill of, when possession of the goods necessary to its validity, 92, 93,
- Satisfaction on the roll, entry of, 112; upon motion, 112; or without it, by consent, 112; how, 113.
- Satisfaction piece, in Q. B., in what cases, 113.
- Scire facias*, 34; to revive a judgment after a year, 34; after death of parties, 34; against heir and terretenants, 35; after marriage of feme sole party; against bail, 35; on judgment in debt on bond to perform covenants, &c., for subsequent breaches, 35; on judgments of assets *in futuro*, 35.
- The writ, and proceedings upon it, 35; the writ, how directed, tested and returnable, 35; motion when neces-

- sary, 36; writ how sued out, 36. Judgment for want of appearance, 37; appearance, 38; declaration, plea, issue, execution, 38; costs, 38.
- Scire facias*, amendment of, 125; not usually of *sci. fa.* against bail, 116.
- Scire facias ad audiendum errores*, no longer necessary, 144.
- Scire facias*, on marriage of feme sole, 35.
- Scire facias quare executionem non*, no longer necessary, 143.
- Scire facias ad rehabendam terram*, in what cases, after *elegit*, 98.
- Scire fieri* inquiry, in what cases, 200.
- Scotland, commissioners in, for taking affidavits to be used in the courts of Westminster, 280.
- Securities for money, taken under a *fi. fa.*, 90.
- Seizure of goods under a *fi. fa.*, 90, 94.
- Service, how, of an award, 254; of declaration in ejectment, 153, 162; of notice under the insolvent acts, 209; of notice to quit, 150; of notice upon a *scire facias*, 37; of order of a judge, 301; of rule nisi, 289; of rule for the purpose of proceeding to attachment, 305; of rule nisi for an attachment, 308; of rules absolute, 294; of writ of summons against hundredors, 201.
- Set off of judgments and costs, 109; in different actions, 109; in the same action, 110; of costs in equity, 111; of costs under an award, 112; in what cases not, 112.
- Setting aside an award, 258, 261; execution of writ of inquiry, 14; nonsuit, 13; verdict, 1; verdict on a writ of trial, 14.
- Several defendants, costs in case of, 57; *elegit* against one of several, 97.
- Several issues, costs in case of, 58.
- Several writs of execution, at the same time, allowed, 83.
- Sheffield, court of requests, cases relating to, 56.
- Sheriffs, their duties, with respect to writs of execution, 94, 98; writs of attachment, 309, 310.
- Sheriffs, deputies of, for taking replevins, 181.
- Sheriff's interpleader, 103; in what cases 103; the rule, 105; issue, costs, &c., 107, 109.
- Sheriff's poundage, right to, suspended pending a rule of interpleader, 107.
- Sheriff's liability for rent, when he seizes under a *fi. fa.*, 95.
- Sheriff's return to a writ of *elegit*, 98.
- Signature, to an affidavit, 279.
- Signature of counsel, to an assignment of errors, 143; to joinder in error, 144.
- Similiter*, want of it, how remedied, 124.
- Slander, verbal, costs in action for, 39.
- Smallness of damages, when a ground for a new trial, 5.
- Southwark, court of requests of, cases relating to, 56.
- Special bailiff, execution executed by, 88.

- Special jury, costs of, 73.
 Speedy execution in ejectment, certificate for, 170.
 Stamp duty, upon an award, 247.
 Staying proceedings by a rule, effect of it, 288.
 Staying proceedings by a judge's summons, in what cases and from what time, 299.
 Stock, lien of judgments upon, 28.
 Submission to arbitration, 235 ; by whom, 236 ; by order of *nisi prius*, 236 ; by rule of court or judge's order, 237 ; by bond, deed, or agreement, 237 ; by parol, 238 ; form of a bond of submission, 357. Revocation of, in what cases and how, 239. Making it a rule of court, 254. Award, when set aside, for not pursuing the submission, 264.
 Subornation of witness, when a ground for a new trial, 7.
 Suggestions on the roll, in what cases, for costs, under acts relating to courts of requests, 54 ; for double or treble costs, 65 ; in the nature of an avowry, after judgment on demurrer or of *non pros* in replevin, 186.
 Summons of a judge, 298 ; when peremptory, 299 ; when *ex parte*, 299 ; service of, 299 ; attendance upon it, 298 ; when and from what time a stay of proceedings, 299.
 Summons upon a plaint of replevin, in the county court, 183.
 Summons, writ of, amendable in what cases, 125.
 Sunday, service of rule for attachment upon, 308 ; of declaration in ejectment upon, 153.
 Supersedeas of a prisoner, 229 ; for not declaring, 229, 221 ; for not proceeding to trial or final judgment, 229, 223 ; for not charging in execution, 229, 224 ; prisoner once supersedeable, always so, 229 ; prisoner's right to, when waived, 230 ; in what cases not granted, 230, 235. Application for, 231. Discharge of prisoners supersedeable, by the keeper of the Queen's prison, 231.
 Supersedeas of execution, in what cases a writ of error operates as, 138.
 Sureties in replevin, 180 ; to what extent liable, 183 ; when discharged, 182.
 Surprise, when a ground for a new trial, 11.
 Surrey, court of requests for, cases relating to, 56.

T.

- Table of costs, in causes not exceeding 20*l.*, p. 74, 77, 78 ; in causes exceeding 20*l.* p. 78.
 Taxation of costs, 66 ; notice of taxation, 66 ; in Exchequer, copy of the bill of costs must be given, 67. What costs allowed, 67 ; in taxing between attorney and client, 67. What costs allowed, in taxing between party and party,

- 69; costs in the cause (what, 69), allowed, 69; costs of new trial, 19; or *venire de novo*, 22; counsel's fees, 73; expenses of witnesses, 70; and of getting up evidence, 73; no distinction in taxation, though a town cause be tried in the country, 73. Taxation in a cause where the debt does not exceed 20*l.*, 74; tables of costs, 76—82. Review of taxation, in what cases, 82; affidavit upon motion, 82.
- Taxation**, notice of, 66.
- Tenants in common**, consent rule in ejectment against, 166; notice to quit given to one, its effect, 150; given by one, 149.
- Tenant's fixtures** may be seized under a *fi. fa.*, 91.
- Tenants from year to year**, &c., when entitled to notice to quit, 148.
- Term for years**, may be sold under a *fi. fa.*, 91; may be delivered or extended under an *elegit*, 98.
- Term**, last day of, what motions can be made on, 286, 287; or cause shown, 292.
- Terretenants**, *scire facias* against, 35.
- Testatum* writs of execution, what, and when necessary, 84.
- Teste** of writ of error, 137; of writs of execution, 84, 85; of *scire facias*, 35.
- Time** given to principal does not discharge sureties in replevin, 182.
- Tithes**, costs in action for not setting out, 39.
- Title** of affidavit, 272; of the court, 272; and of the cause, 273, 276; consequence of defect in the title, 284.
- Tower hamlets**, court of requests of, cases relating to, 56.
- Towns**, actions against the inhabitants of, 201.
- Tradesmen**, costs in action against, for trespass in hunting, &c., 44.
- Transcript** in error, 142; amendment of, in what cases, 119.
- Treaty** pending between prisoner and plaintiff, in what cases it prevents a supersedeas, 230.
- Treble** costs, in what cases, 64; and how computed, 65; suggestions for, in what cases necessary, 65; in what cases costs as between attorney and client substituted for them, 64.
- Trespass**, costs in, where the damages are under 40*s.*, p. 42.
- Trespass** for mesne profits, 180; in what cases, 180; to recover what, 180; in whose name, 181; evidence, 190.
- Trespass**, in hunting, &c. by inferior tradesmen, costs in, 44.
- Trial** in ejectment, 168, 178; in replevin, 185.
- Trial**, notice of, in ejectment, 168, 174; in actions against prisoners, 223; in replevin, 185.
- Trial** of an action against a prisoner, within what time, 223.
- Trifling** actions, new trial in, 12.
- Trust** property, in what cases extendable under an *elegit*, 97.

U.

- Umpire, 241 ; when and how appointed, 241 ; proceeding by, 242 ; umpirage, 242.
- Uncertainty in an award, 266.
- Undefended cause, trying a defended action as, in what case ground for a new trial, 10.
- Under-sheriff, his notes to be produced on moving for a new trial, in a case tried before him on a writ of trial, 15.

V.

- Vacant possession, ejectment in the case of, 171.
- Variance, between a writ of execution and the warrant thereon, 88 ; between notice of action and writ, &c., in actions against justices, 213.
- Variance, amendment for, 128, 129.
- Venire de novo, 21 ; in what cases, 21 ; costs, 22 ; in actions against justices, 214 ; in penal actions, 187.
- Vexatious actions, new trial in, 13.
- Verdict, taken subject to an award, 236.
- Verdict, in ejectment, 169.
- Verdict, amendment of, 129.
- Verdict against evidence, ground for a new trial, 3.
- Void proceedings, no time limited for setting them aside, 315 ; distinction between them, and proceedings merely irregular, 314, 315.

W.

- Waiver, what, of an irregularity in a previous proceeding, 315, 318 ; none, of a void proceeding, 315 ; of defects in an affidavit, 283 ; of personal service, 308 ; in service of rule, 290 ; of right to *supersedeas*, 230.
- Warrant, on a writ of execution, 88.
- Warrant of a justice, demand of, previous to action against a constable, 215.
- Warrant to enter satisfaction on the roll, 112.
- Waste, recognizance not to commit, in what cases in ejectment, 179.
- Westminster, court of requests of, cases relating to, 56.
- Wilful trespass, costs in action for, 44.
- Witnesses before an arbitrator, 243 ; how compelled to attend, 243 ; how sworn, 243.
- Witnesses, default or incompetency of, when a ground for a new trial, 6 ; erroneous rejection of, for incompetency, when a ground for a new trial, 2.

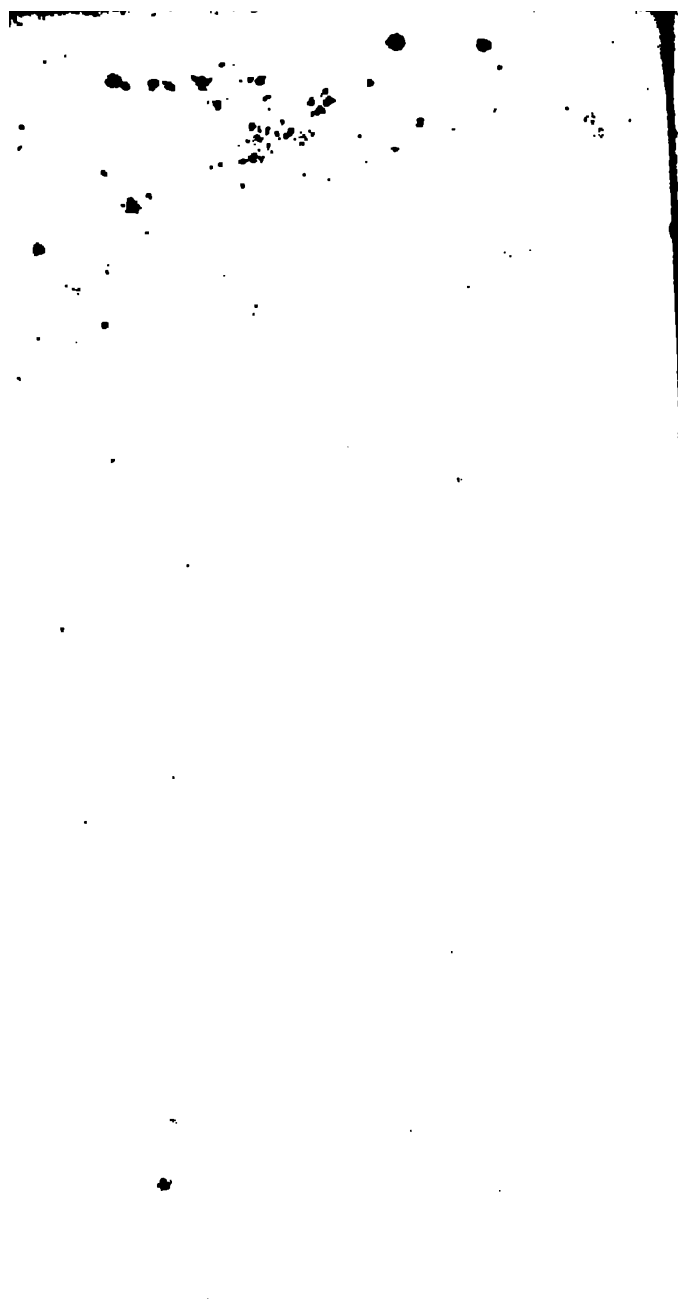
- Witnesses' expenses, what allowed on taxation, 70.
- Words, slanderous, costs in actions for, 39.
- Writ of attachment, 303; how and upon what grounds obtained, 303—305; proceedings thereon, 305.
- Writ of detainer, 219: how sued out, 219; from what court, 220.
- Writ of inquiry, in what cases may be amended, 119. Execution of it, in what cases set aside, 14.
- Writ of inquiry in replevin, 184.
- Writ of error, 135: in what cases, 135; within what time, 135; by and against whom, 135; to what court, 136; the writ, and how sued out and allowed, 136; in what cases it abates, or may be quashed, 137; how far a *superseas*, of execution, 138; bail, 140; certifying the record, 142; assigning errors, 143; joinder in error, 144; argument, &c. 144; interest, 145; costs, 145; judgment, &c. 146. Error *coram nobis* or *coram vobis*, 146. Writ of error, in what cases amendable, 119.
- Writs of execution, 83. Execution generally, 83: in what cases, and how sued out, 83; direction, teste and return, 84; it must pursue the judgment, 86; how indorsed, 87; when to be sued out, 88; delivery of the writ to be executed, 88; priority of writs, 88; remedy for the amount levied, 89. Writ, when amendable, 119.
- Fieri facias*, 90; what goods, &c. may be taken under it, 90; how executed, 94; *venditioni exponas*, and *distingas*, 94; rent deducted, 95. *Elegit*, 96: what property may be extended under it, 97; writ, how executed, 98; how returned and filed, 98. *Capias ad satisfaciendum*, 99; how executed, 99; discharging the defendant, its effect, 99; retaking after an escape, 101.
- Writ of execution, in ejectment, 170; in replevin, 186.
- Writs in penal actions, 187; amendment of, 122.
- Writ of possession in ejectment, 170.
- Writ of restitution, after writ of error, 146.
- Writ *de retorno habendo*, 185.
- Writ of summons, in what cases amendable, 64.
- Writ of *superseas*, 229: in what cases, 229; application, 231; by the keeper of the Queen's Prison, 231. See "*Prisoner*."
- Writ of trial, in what cases amended, 127. Setting aside the verdict upon, when and how, 14.

FINIS.











[

